Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DAIMLERCHRYSLER AKTIENGESELLSCHAFT,

Petitioner,

v.

SCOTT OLSON, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF KAREN L. OLSON, AND VICKIE OLSON,

Respondents.

Petition for a Writ of Certiorari to the Texas Court of Appeals, Third Appellate District

PETITION FOR A WRIT OF CERTIORARI

JUSTS N. KARLSONS
DAVID M. RICE
MATTHEW J. KEMNER
Carroll, Burdick & McDonough LLP
44 Montgomery Street
Suite 400
San Francisco, CA 94104
(415) 989-5900

ALAN E. UNTEREINER*
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

(Additional Counsel Listed on Inside Cover)

141 pp

JOE R. GREENHILL
Baker Botts, L.L.P.
98 San Jacinto Blvd.
Suite 1600
Austin, TX 78701-4039
(512) 322-2500

QUESTION PRESENTED

Whether, in a product liability action involving a product exclusively designed for and sold in a foreign market and never placed in any "stream of commerce" flowing into the United States, a State may, consistent with the Due Process Clause of the Fourteenth Amendment, exercise "general" *in personam* jurisdiction over a non-U.S. manufacturer that has no offices, employees, property, books, mailing address, bank account or agent for the service of process in the State, based on a determination that the manufacturer has engaged in "continuous and systematic" activities in the forum by (a) maintaining an Internet website that includes product information and allows email communications with users throughout the world; (b) placing *other*, *different* products into a "stream of commerce," a portion of which flows into the State; (c) filing an unrelated trademark infringement lawsuit in a federal court located in the State; and (d) maintaining a manufacturer-distributor relationship with an indirect, wholly owned U.S. subsidiary that is incorporated (and has its principal place of business) outside of the State and has scrupulously maintained its separate corporate existence.

RULE 29.6 STATEMENT

Petitioner DaimlerChrysler Aktiengesellschaft has no parent corporation, and no other publicly traded company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Texas Court of Appeals (App., *infra*, 1a-29a) is reported at 21 S.W.3d 707. The orders of the Texas Supreme Court denying the petition for mandamus (App., *infra*, 30a-31a) and dismissing the petition for review (*id.* at 32a-33a) are unreported. The order of the trial court overruling the special appearance (*id.* at 34a-35a) is unreported.

JURISDICTION

The Texas Court of Appeals' judgment was entered on June 15, 2000. On April 5, 2001, the Texas Supreme Court denied the petition for a writ of mandamus and dismissed the petition for review. App., *infra*, 30a-33a. Motions for rehearing with respect to both orders were denied on September 20, 2001. *Id.* at 36a-39a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

This Court has jurisdiction even though "there has not yet been a trial on the merits." *Calder* v. *Jones*, 465 U.S. 783, 788 n.8 (1984) (citing *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 485 (1975)). If this Court were to grant review and reverse the judgment, that action "would be preclusive of any further litigation on the relevant cause of action" because the Texas courts would lack personal jurisdiction over petitioner. *Cox*, 420 U.S. at 482-83. For that reason, and because "a refusal immediately to review the state court decision might seriously erode federal policy" (*id.*), this Court has repeatedly exercised review in "cases presenting jurisdictional issues in this posture." *Calder*, 465 U.S. at 488 n.8 (citing *Rush* v. *Savchuk*, 444 U.S. 320 (1980), *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), and *Shaffer* v. *Heitner*, 433 U.S. 186, 195-96 n.12 (1977)).

Moreover, mandamus is an independent legal proceeding whose termination constitutes a "final decision" of the state courts within the meaning of 28 U.S.C. § 1257(a). See *Mt. Vernon-Woodbury Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916); STERN, GRESSMAN, SHAPIRO, & GELLER, SUPREME COURT PRACTICE 108 (7th ed.

1993). Petitioner seeks review, in the alternative, of the Texas Supreme Court's judgment in denying the petition for a writ of mandamus. (For simplicity's sake, we have omitted mention of this alternative basis from the cover of this petition.) This Court has addressed due process challenges to personal jurisdiction on writ of certiorari from mandamus proceedings in the state courts. See *Burnham* v. *Superior Court of California*, 495 U.S. 604, 608 (1990).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." The pertinent provisions of the Texas long-arm statute, Tex. Civ. Prac. & Rem. Code Ann. § 17.042, are set forth at App., *infra*, 40a.

STATEMENT

This case raises an important issue of federal law that is frequently litigated in state and federal courts: the limits the Due Process Clause places on the power of a State through its long-arm statute to exercise *in personam* jurisdiction over a nonresident defendant. That issue has spawned enormous confusion, and deep conflict, in the lower courts – especially in product liability actions brought against foreign corporations that manufacture products outside of the forum.

The facts of this case present a compelling opportunity for the Court to dispel confusion over the constitutional boundaries of "general" and "specific" jurisdiction. The Mercedes-Benz 500SE at issue was designed for the European market and never sold in the United States. A member of respondents' family purchased it used in Germany and unilaterally brought it to Texas. Respondents argued for a hybrid species of specific jurisdiction based upon a stream of commerce that carried different Mercedes-Benz vehicles to Texas. This unsupported theory should have been rejected because respondents' claims do not "arise out of" any contacts the German manufacturer had with Texas.

The Texas Court of Appeals did not even address respondents' theory, but instead ruled that Texas courts may exercise general jurisdiction over the foreign manufacturer, even though the company had no offices, employees, property, bank account, agent for the service of process or other traditional indicia of presence within the State. To reach that astonishing result, the court relied on several unconventional considerations, such as the maintenance of an Internet website, none of which reflects conduct purposefully directed toward the State of Texas. These factors, moreover, are so broadly applicable to modern businesses that they seriously undermine the guarantee of due process for foreign corporations that happen to be sued in Texas for claims arising anywhere in the world.

A. The Proceedings in the Trial Court

This case arises out of a two-car accident in Temple, Texas, on April 3, 1995. According to the allegations of respondents' complaint, Karen Olson was driving a 1980 Mercedes-Benz 500SE when she was struck by a Ford van owned by the Central Produce Company. Following the collision, the Mercedes-Benz caught fire. Karen Olson died in the accident.

In 1996, respondents, the adult children of Karen Olson, filed a lawsuit against Daimler-Benz Aktiengesellschaft ("Daimler-Benz AG")[1] and Central Produce in the district court for the 169th Judicial District, Bell County, Texas. In addition to advancing a negligence claim against Central Produce, respondents alleged that an unspecified design and/or manufac-

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[1] In December 1998, Daimler-Benz AG ceased to exist as the result of a business combination with Chrysler Corporation. One of the resulting entities was petitioner DaimlerChrysler Aktiengesellshaft ("DaimlerChrysler AG"), a German corporation, which acquired all of the stock of Daimler-Benz AG. (In the 1998 transaction, Chrysler Corporation changed its name to DaimlerChrysler Corporation, and it is now an indirect U.S. subsidiary of DaimlerChrysler AG.) The lower court properly ignored these events because Daimler-Benz AG's amenability to jurisdiction hinged on its activities "in 1996, when the Olsons filed suit, and for a reasonable time before 1996." App., *infra*, 10a; see *id.* at 3a-4a n.2. We accordingly refer to Daimler-Benz AG throughout this petition.

turing defect in the Mercedes-Benz 500SE was a "producing cause" of Karen Olson's death. Daimler-Benz AG filed a special appearance objecting to the trial court's exercise of personal jurisdiction. The parties entered into a stipulation of jurisdictional facts (App., *infra*, 52a-60a). They also submitted other materials, which established that Karen Olson's former husband bought her car used in Germany in 1984 and later brought it to Texas. This Mercedes-Benz model (the 500SE) was never sold in the United States and was designed to European specifications.

Daimler-Benz AG – a German corporation with its principal place of business in Stuttgart – manufactured the vehicle in Germany. *Id.* at 2a, 54a. At the time this lawsuit was filed, Daimler-Benz AG was not qualified, licensed, or authorized to do business in Texas; had no officers, agents, or employees in Texas; did not own, maintain, control, lease, or possess any office, plant, or warehouse in Texas; had no equipment, inventory, or books and records in Texas; had no mailing address, telephone listing, bank account, or other real or personal property in Texas; and had never appointed an agent for service of process in Texas. *Id.* at 10a, 47a-48a, 55a.

During the relevant time period, Daimler-Benz AG had a "wholly owned but separately operated" subsidiary, Daimler-Benz of North America Corporation ("DBNAC"), which was a Delaware corporation with its principal place of business in New York. *Id.* at 3a, 54-55a. DBNAC, in turn, had a "wholly owned but separately operated" subsidiary, Mercedes-Benz of North America, Inc. ("MBNA"), which was a Delaware corporation with its principal place of business in New Jersey. *Id.* at 55a. MBNA served as the authorized distributor of Mercedes-Benz automobiles and parts in North America. *Id.* Under the distribution agreement, MBNA selected models and parts it wished to distribute in the United States, purchased them in Germany, and then imported them into this country, using its own facilities. *Id.* at 10a-11a, 50a, 55a.

The parties stipulated that Daimler-Benz AG never advertised the sale of Mercedes-Benz vehicles in Texas or the

United States; such advertising was conducted only by MBNA and its local dealers. *Id.* at 56a. They also stipulated that Daimler-Benz AG maintained a website with certain features on the Internet. *Id.* at 57a. Finally, Daimler-Benz AG submitted uncontroverted evidence that it had "never participated in the day-to-day conduct of MBNA's business," the parent and indirect subsidiary had their own "officers and directors" as well as "separate corporate existences," and these "distinct and separate existences" had "always been formally maintained, exercised, and observed in all respects." *Id.* at 49a.

After a hearing, the trial court summarily "overruled and denied" Daimler-Benz AG's special appearance. *Id.* at 34a-35a.

B. The Proceedings in the Appellate Courts

A panel of the Texas Court of Appeals for the Third District, at Austin, upheld the trial court's exercise of general *in personam* jurisdiction. After Daimler-Benz AG filed a motion for rehearing, the panel withdrew its opinion and substituted a slightly modified opinion. App., *infra*, 1a-29a. In its substituted opinion, the court noted that it need only consider "whether it is consistent with federal due process for Texas courts to assert personal jurisdiction over Daimler-Benz." *Id.* at 4a. The court explained that, "[u]nder the federal constitutional test of due process, a state may assert personal jurisdiction over a nonresident defendant only if" two preconditions are satisfied: (1) "the defendant has purposefully established minimum contacts with the forum state," and (2) "the exercise of jurisdiction comports with traditional notions of fair play and substantial justice." *Id.*

1. *Minimum Contacts*. The court observed that the minimum contacts analysis has been refined "into two types of jurisdiction – general and specific." *Id.* at 5a. "Specific jurisdiction exists when the cause of action *arises out of or relates to* the nonresident defendant's contacts with the forum state." *Id.* (emphasis added). "General jurisdiction," in contrast, exists without such a connection "when the defendant's contacts with the forum state are *continuous and systematic*." *Id.* (emphasis added). General jurisdiction is "more demanding" and

"requir[es] a showing of *substantial* activities *within* the forum state." *Id.* (emphasis added).

The court of appeals acknowledged that Daimler-Benz AG lacked all the traditional indicia of corporate presence in Texas. *Id.* at 10a. Nonetheless, it concluded that the corporation had "systematic and continuous" contacts with the State and thus was "subject to general jurisdiction." *Id.* at 1a-27a. The court relied principally on four considerations.

First, the court relied on Daimler-Benz AG's "place[ment of] a large volume of vehicles into a stream of commerce destined for the United States." *Id.* at 27a. The court deemed that consideration important even though, as it acknowledged (and the parties stipulated), the car involved in this case did *not* travel to Texas through the stream of commerce. See *id.* at 11a.

Second, the court relied (*id.* at 12a-16a) on the fact that Daimler-Benz AG and its U.S. distributor, MBNA, had filed an unrelated trademark infringement complaint in a federal court in Texas. See *id.* at 61a-75a (reproducing complaint). Among other things, the complaint alleged that a Dallas car dealer had unlawfully used federally registered trademarks and service marks owned by Daimler-Benz AG and licensed to MBNA. The court treated the lawsuit as evidence that Daimler-Benz AG had advertised in Texas (because it alleged that Daimler-Benz AG and MBNA had "expended considerable sums of money using, promoting and advertising said marks and trade names in commerce"). *Id.* at 12a-14a, 65a. The court also read the complaint as "necessarily impl[ying]" that Daimler-Benz AG had "engaged in competition" and "established business relationships and business operations in Texas." *Id.* at 15a.

Third, the court held that it was proper to impute to Daimler-Benz AG the Texas activities and contacts of MBNA, an indirect subsidiary owned though DBNAC. Despite the general rule that "a foreign corporation is not subject to the jurisdiction of the forum state merely because its subsidiary is present or doing business there," the court stated that "the operative question" was "whether MBNA is in fact a mere division or branch of a larger whole." *Id.* at 16a, 17a n.5 (internal

quotations omitted). That standard was satisfied, the court concluded, even though the two entities were "formally separate" and "strictly observed corporate formalities" (*id.* at 20a, 21a), were "separately operated" (*id.* at 24a), and Daimler-Benz AG had submitted evidence showing that it had "never participated in the day-to-day conduct of MBNA's business." *Id.*

Fourth, the court noted that "Daimler-Benz maintains an Internet website by means of which individuals around the world, including those in Texas, can communicate with it electronically" through email. *Id.* Although it "does not offer Mercedes-Benz vehicles for sale to Texas residents over the Internet," and indeed "refers sales inquiries from the U.S. to MBNA," the website does "offer[] Internet users information about Daimler-Benz and its worldwide products and services" and permits those who visit it (including Texas residents) to "register" to receive "direct mailings" electronically. *Id.* at 24a-25a. Applying a "sliding scale" test that originated in *Zippo Mfg. Co.* v. *Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), the court of appeals ruled that Daimler-Benz AG's website featured a "level of interactivity" that, "standing alone," "might not be enough to subject [it] to jurisdiction in Texas," but would be "consider[ed] * * * a factor, along with the other contacts that exist in this case." App., *infra*, 25a-26a.

2. *Fair Play and Substantial Justice.* Having concluded that minimum contacts existed, the court proceeded to examine "the second prong of the due process test": whether "the assertion of personal jurisdiction by the district court comports with traditional notions of fair play and substantial justice." *Id.* at 26a-27a. In reaching the conclusion that this second requirement was also satisfied, the court examined seven factors employed by the Texas courts in this inquiry. *Id.*

On July 31, 2000, Daimler-Benz AG sought review of the court of appeals' decision by filing petitions for review and for a writ of mandamus in the Texas Supreme Court, which subsequently directed the parties to file briefs on the merits. On April 5, 2001, the Texas Supreme Court denied the petition for a writ of mandamus and dismissed the petition for review. *Id.*

at 30a-33a. Motions for rehearing with respect to both orders were denied on September 20, 2001. *Id.* at 36a-39a.

REASONS FOR GRANTING THE PETITION

This case presents the Court with a valuable opportunity to resolve important conflicts in the lower courts and dispel widespread confusion over the limits imposed by the Due Process Clause on the power of a State to exercise *in personam* jurisdiction over a non-resident defendant. That issue has "become one of the most litigated issues in state and federal courts." Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 & n.5 (1995) (more than 2300 cases involving "minimum contacts" test in 1990-95). The reasons are straightforward: most States have enacted long-arm statutes that reach as far as the Due Process Clause permits; this Court's most recent decisions involving the "minimum contacts" test are a decade old and were sharply divided, in reasoning if not in result; and the rapid growth of the Internet, with its potential to support new claims of corporate "contacts" with distant fora, has fueled litigation and created even greater doctrinal uncertainty.

In the decision below, the Texas Court of Appeals has upheld the exercise of *in personam* jurisdiction over a foreign manufacturer on the basis of considerations – such as the maintenance of a website not specifically directed at the forum and not used to make sales – that apply with equal force to a broad array of foreign corporations. Worse yet, the court below approved the assertion of "general" jurisdiction, even though Daimler-Benz AG lacked all of the traditional indicia of corporate presence in the State. As a consequence, Daimler-Benz AG (and others with equally tenuous connections) now can be haled into Texas courts to defend lawsuits that are wholly unrelated to any contacts with Texas they may have. If permitted to stand, the decision below will seriously undermine the "degree of predictability to the legal system" that is necessary to "allow[] potential defendants to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit." *World-Wide*

Volkswagen Corp. v. *Woodson*, 444 U.S. 286, 297 (1980) (internal quotations omitted). This Court should grant review to prevent that result as well as to resolve the various conflicts created or exacerbated by the decision below, including several conflicts between the Texas courts and the Fifth Circuit. See *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985) (resolving conflict between state court and federal circuit in which it is located to prevent forum-shopping).

I. The Court of Appeals' General Jurisdiction Analysis and Holding Conflict with the Decisions of Other Courts and Raise Important and Recurring Issues

In *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny, this Court has held that the Due Process Clause imposes significant limits on the power of a State to assert *in personam* jurisdiction over a nonresident defendant. The defendant must have "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316 (internal quotations omitted).

When the cause of action does not arise out of or relate to the defendant's activities in the forum, those activities must be sufficiently "continuous and systematic" to make the assertion of *in personam* jurisdiction reasonable. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952). This Court has distinguished such "general" jurisdiction from "specific" jurisdiction, which requires a lesser showing of contacts and may be asserted if the plaintiff's claims "arise out of or relate to" the defendant's forum contacts. *Helicopteros Nacionales de Columbia, S.A.* v. *Hall*, 466 U.S. 408, 414 (1984).

A. This Court's General Jurisdiction Decisions

Since *International Shoe*, most of this Court's "minimum contacts" decisions have been resolved on the basis of "specific" jurisdiction. In only two cases – *Perkins* and *Helicopteros* – has this Court resolved questions concerning the assertion of

general jurisdiction over corporate defendants.[2] Further guidance from this Court in this important area of law is needed.

Perkins involved a suit in the Ohio courts by a shareholder of a mining concern organized under the laws of the Philippines. The company's mining operations were in the Philippines but had been "completely halted during the occupation of the Islands by the Japanese." 342 U.S. at 447. During that suspension, the company's president had returned to Ohio, where he "maintained an office," "kept the office files of the company," carried on "correspondence relating to the business * * * and to its employees," "drew and distributed" salary checks for himself and two secretaries "who worked there with him," "used and maintained" two active bank accounts "carrying substantial balances of company funds," used another bank as transfer agent for the company's stock, held several directors' meetings, "supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines," and "dispatched funds to cover purchases of machinery for such rehabilitation." *Id.* at 447-48. Because these activities in Ohio amounted to the "continuous and systematic supervision of the necessarily limited wartime activities of the company," they were a sufficient basis for the exercise of general jurisdiction. *Id.*

In *Helicopteros*, the Court reversed a decision of the Texas Supreme Court upholding the exercise of general jurisdiction over a Colombian corporation with its principal place of business in Bogota. The defendant, which provided helicopter transportation for oil and construction companies in South America, was sued after a helicopter it owned crashed in Peru, killing four U.S. citizens. After noting that the defendant lacked all of the traditional characteristics of corporate "presence" within Texas (such as offices, employees, or operations), this Court rejected the argument that Texas could nevertheless assert gen-

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[2] In *Burnham* v. *Superior Court of California*, 495 U.S. 604 (1990), this Court unanimously upheld the assertion of general jurisdiction over an *individual* defendant based on temporary presence in the forum. The Court divided sharply (4-4-1) as to the proper rationale, however.

eral jurisdiction because the defendant (1) purchased 80% of its helicopters, spare parts and equipment worth more than $4 million, and training services from a company located in Texas; (2) sent its CEO to Texas for a contract-negotiation session; (3) sent personnel to Texas for training; and (4) accepted into its New York bank account checks drawn on a Texas bank. 466 U.S. at 410-11, 416-19. The Court reaffirmed (*id.* at 417-18 & n.12) a pre-*International Shoe* decision involving a corporate defendant, *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U.S. 516 (1923), which held that purchases and related trips are not a sufficient basis for a State's assertion of jurisdiction over a foreign corporation that lacked an established place of business in the forum and never regularly carried on business there.

Perkins, *Helicopteros*, and *Rosenberg Bros.* confirm the requirement of traditional indicia of corporate presence within a State. In the only case where general jurisdiction was upheld – *Perkins* – many of those indicia were present, whereas in both cases where the assertion of jurisdiction was invalidated they were absent. In this case, the parties stipulated that petitioner similarly lacked all of the traditional indicia of corporate presence within Texas. See App., *infra*, 10a-11a.

Nevertheless, the court of appeals ruled that petitioner had engaged in such "continuous and systematic" activities within Texas that it could be haled into Texas courts to answer even claims wholly unrelated to any contacts Daimler-Benz AG might have with the State. To reach that result, the court of appeals relied on a variety of nontraditional considerations, including Daimler-Benz AG's placement of *other*, *different* products into a "stream of commerce," part of which flows into Texas; its maintenance of an Internet website; and Daimler-Benz AG's entry into an ordinary, exclusive distributorship agreement with an indirect U.S. subsidiary. But see *Bedrejo* v. *Triple E Canada, Ltd.*, 984 P.2d 739, 741-72 (Mont. 1999) (rejecting general jurisdiction over foreign manufacturer of mobile home sold outside of State; reasoning that absence of traditional indicia of presence was "significant"; and rejecting argument based on website and other nontraditional factors). As

we explain below, the lower court's analysis and holding conflict in multiple respects with the decisions of other courts and raise important issues warranting this Court's review.[3]

B. The Court of Appeals' Reliance on Daimler-Benz AG's Placement of Other, Different Products into a "Stream of Commerce" Flowing into Texas

In upholding the assertion of general jurisdiction, the court relied on Daimler-Benz AG's placement of "a large volume of vehicles into a stream of commerce destined for the United States." App., *infra*, 27a; see also *id.* at 3a, 11a. That analysis conflicts with the decisions of other courts and presents a valuable opportunity to address the pervasive confusion concerning the meaning of the "stream of commerce" theory.

The decision below conflicts with a line of cases holding that the "stream of commerce" theory is a basis for *specific* jurisdiction, but cannot be used to support *general* jurisdiction. See, *e.g.*, *Alpine View Co.* v. *Atlas Copco AB*, 205 F.3d 208, 216 (5th Cir. 2000); *Bearry* v. *Beech Aircraft Corp.*, 818 F.2d 370, 375 (5th Cir. 1987); *Williams* v. *Wilson*, 939 F. Supp. 543, 549 (W.D. Tex. 1995), aff'd, 95 F.3d 1149 (5th Cir. 1996); *Kern* v. *Jeppesen Sanderson, Inc.*, 867 F. Supp. 525, 536 (S.D. Tex. 1994); *Regent Lighting Corp.* v. *American Lighting Concept, Inc.*, 25 F. Supp. 2d 705, 711-12 (M.D.N.C. 1997).

The court of appeals' failure to grasp this fundamental limitation on the "stream of commerce" theory may well be attributable to the serious and long-standing confusion surrounding that theory, which only this Court can resolve. The

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[3] Although *Helicopteros* and *Perkins* "provide some guidance, the exact status and boundaries of general jurisdiction remain uncertain" and have produced "discordant results." Brilmayer, Haverkamp & Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 724 (1988). For example, it is not clear whether the "continuous and systematic" test focuses on "the quantity of activities in the forum, the quality or nature of the activities in the forum, or other considerations." Comment, *How Specific Can We Make General Jurisdiction: The Search for a Refined Set of Standards*, 44 BAYLOR L. REV. 593, 597 (1992).

theory was first discussed in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), which held that the Oklahoma courts could not exercise jurisdiction over a nonresident retailer (World-Wide) and its wholesale distributor based on the fact that an automobile sold by the retailer in New York to New York residents was later driven to Oklahoma (where it was involved in an accident). Although the automobile's foreign manufacturer (Audi) and its U.S. importer (Volkswagen of America) were not parties before this Court in *World-Wide Volkswagen*, the Court nonetheless offered this observation:

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others. The forum State does not exceed its power under the Due Process Clause if it asserts personal jurisdiction over a corporation that *delivers its product into the stream of commerce* with the expectation that they will be purchased by consumers in the forum State.

444 U.S. at 297-98 (emphasis added). "[B]ecause the example used by the Court was directed at manufacturers and distributors," but "only the retail dealer and regional distributor were contesting jurisdiction," this passage "is dicta." *Ruckstuhl* v. *Owens Corning Fiberglas Corp.*, 731 So.2d 881, 887, 889 (La.), cert. denied, 528 U.S. 1019 (1999).

In *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102 (1987), this Court sought to clarify the *World-Wide Volkswagen* dicta. Four Members of this Court were of the view that the "placement of a product into the stream of commerce, without more, is *not* an act of the defendant purposefully directed toward the forum State." 480 U.S. at 112 (opinion of O'Connor, J.) (emphasis added). According to the plurality, "[a]dditional conduct of the defendant" must be shown before *in personam* jurisdiction may be asserted. *Id.*

Another bloc of four Justices, however, took the contrary view that the mere placement of a product into the stream of commerce is enough to satisfy due process (as long as the stream of commerce is understood to mean "the regular and anticipated flow of products from manufacture to distribution to retail sale"). *Id.* at 117 (opinion of Brennan, J.). Finally, Justice Stevens wrote a separate concurrence stating that there was no need to decide the issue of minimum contacts because California's exercise of jurisdiction was unreasonable. *Id.* at 121-22.

The Court's 4-1-4 decision in *Asahi* has generated substantial confusion, and conflict, in the lower federal and state courts. Some courts have adopted the approach of Justice O'Connor's plurality opinion, *e.g.*, *Lesnick* v. *Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994), cert. denied, 513 U.S. 1151 (1995); *Boit* v. *Gar-Tec Products, Inc.*, 967 F.2d 671, 682-83 (1st Cir. 1992), whereas others have endorsed the approach of Justice Brennan's opinion, *e.g.*, *Dehmlow* v. *Austin Fireworks*, 963 F.2d 941, 946-47 (7th Cir. 1992). Still other courts, in the face of the *Asahi* vote, "have continued to apply" the dicta in *World-Wide Volkswagen*. *Vermeulen* v. *Renault U.S.A., Inc.*, 985 F.2d 1534, 1548 n.17 (11th Cir.), cert. denied, 508 U.S. 907 (1993) (collecting cases); *e.g.*, *Irving* v. *Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir.), cert. denied, 493 U.S. 823 (1989). Compare also *Ruston Gas Turbines, Inc.* v. *Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993) (refusing to follow Justice O'Connor's *Asahi* plurality and adhering to *World-Wide Volkswagen*'s stream-of-commerce rule) with *CCMC* v. *Salinas*, 929 S.W.2d 435, 439-40 (Tex. 1996) (preferring Justice O'Connor's *Asahi* formulation). And the Louisiana Supreme Court has treated the continuing validity, and meaning, of the "stream of commerce" theory as an open issue since there is "no Supreme Court precedent that guides us." *Ruckstuhl*, 731 So.2d at 889. This disarray has been widely acknowledged. See, *e.g.*, *id.* at 887 n.5; *Pennzoil Products Co.* v. *Colelli & Assocs., Inc.*, 149 F.3d 197, 205-06 (3d Cir. 1998); *Lesnick*, 35 F.3d at 945 & n.1.

C. Daimler-Benz AG's Maintenance of a Website

The court of appeals also relied on Daimler-Benz AG's maintenance of a website. App., *infra*, 24a-26a. Employing a "sliding scale" that focuses on "the nature and quality of commercial activity * * * conduct[ed] over the Internet" (*Zippo Mfg.*, 952 F. Supp. at 1124), the court of appeals examined the website to determine where it fell along a "continuum of Internet activities" that "is divided into three categories for purposes of personal jurisdiction." App., *infra*, 25a. The court asserted that Daimler-Benz AG's website did not fall into the first category of "passive" sites that do "no more than make information available to Internet users"; nor was it a site at the other extreme used to "make contracts with residents of other jurisdictions." *Id.* Instead, the website fell into the middle category of "interactive" websites where "the exercise of jurisdiction depends *on the level of interactivity* between the parties on the web site." *Id.* (emphasis added).

The court concluded that the Daimler-Benz AG website was "interactive" because it "allow[s] Texas residents to submit comments and questions to Daimler-Benz representatives and to receive electronic mailings from Daimler-Benz." *Id.* The court reached that conclusion even though Daimler-Benz AG "makes no sales or other contracts" through the website and indeed "refers" any "sales inquiries from the U.S. to MBNA," which "maintains an independent web site." *Id.* at 24a, 25a.

That analysis conflicts with the decisions of other courts in at least two ways. First, although other courts have adopted (or approvingly cited) the *Zippo* framework for analyzing Internet contacts,[4] the D.C. Circuit has effectively rejected that framework. In *GTE New Media Services Inc.* v. *BellSouth Corp.*, 199 F.3d 1343, 1347-50 (D.C. Cir. 2000), the district court had applied the *Zippo* framework and upheld the exercise of juris-

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[4] See, *e.g.*, *Mink* v. *AAAA Development LLC*, 190 F.3d 333, 336 (5th Cir. 1999); *Cybersell, Inc.* v. *Cybersell, Inc.*, 130 F.3d 414, 418-19 (9th Cir. 1997) (citing *Zippo* and agreeing with its focus on the "nature and quality of commercial activity that an entity conducts over the Internet").

diction over regional telephone companies that operated Internet yellow pages services on the ground that the defendants' websites, which were accessible to residents of the District of Columbia, were "highly interactive" and "significantly commercial" in quality and nature. 21 F. Supp. 2d 27, 38 (D.D.C. 1998). The D.C. Circuit reversed, rejecting as "far-fetched" the notion that personal jurisdiction could be based "solely on the ability of District residents to access the defendants' websites, for this does not by itself show any persistent course of conduct by the defendants *in the District*." 199 F.3d at 1349-50 (emphasis added). "Access to a website" – even one highly interactive and commercial in nature – "reflects nothing more than a telephone call by a District resident to the defendants' computer servers." *Id.* Had the lower court in this case applied the D.C. Circuit's approach, Daimler-Benz AG's website would have been accorded no weight in the jurisdictional calculus.

This conflict has been widely acknowledged. *E.g.*, Schmitt & Nikolai, *Application of Personal Jurisdiction Principles to Electronic Commerce: A User's Guide*, 27 WM. MITCHELL L. REV. 1571, 1580 (2001) (D.C. Circuit "rejected the sliding-scale interactivity test in favor of a purposeful availment test"); Recent Case, *Civil Procedure – D.C. Circuit Rejects Sliding Scale Approach to Finding Personal Jurisdiction Based on Internet Contacts*, 113 HARV. L. REV. 2128 (2000) (same); Rollo, *The Morass of Internet Personal Jurisdiction: It Is Time for a Paradigm Shift*, 51 FLA. L. REV. 667, 668 (1999) ("the federal circuits are employing different standards"). Moreover, the D.C. Circuit's approach and the *Zippo* framework are not the only approaches endorsed by courts and commentators to the handling of Internet website "contacts." Some jurisdictions have taken an *even more expansive* approach than *Zippo* and have upheld the assertion of personal jurisdiction based on passive websites. See, *e.g.*, *State* v. *Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 717-21 (Minn. App. 1997) (citing *Inset Instruction Sys., Inc.* v. *Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996)), aff'd by an equally divided court, 576 N.2d 747 (Minn. 1998). See generally Rollo, 51 FLA. L. REV. at

678-94 (canvassing different approaches taken by courts); Recent Case, 113 HARV. L. REV. at 2128 & nn.1-3 (same for academic commentators).

The decision below also conflicts with how other courts have *interpreted* the *Zippo* framework. In *Mink* v. *AAAA Development LLC*, 190 F.3d 333 (1999), the Fifth Circuit categorized a website that was functionally indistinguishable from Daimler-Benz AG's as "passive" under the *Zippo* framework and thus incapable of providing a basis for jurisdiction. Like the website here, the website in *Mink* "post[ed] information about" the company's "products and services" and "provide[d] an e-mail address that permits consumers to interact with the company." *Id.* at 336-37. As in this case, there was "no evidence that" the defendant made sales over the Internet. *Id* at 337. Had this case been brought in a *federal* court in Texas, Daimler-Benz AG's passive website would have been accorded no weight in the jurisdictional calculus under *Zippo*.

This case provides an excellent vehicle for resolving these conflicts. The question of how websites should be treated in the due process analysis in personal jurisdiction cases is undoubtedly "important." *Christian Science Bd. of Directors* v. *Nolan*, 259 F.3d 209, 218 (4th Cir. 2001). It also arises with great regularity, which is hardly surprising given the "extraordinary growth" of the Internet in recent years. *Reno* v. *ACLU*, 521 U.S. 844, 850 (1997) (internal quotations omitted); see also Weber, *Jurisdictional Issues in Cyberspace*, 36 TORT & INS. L.J. 803, 803 (2001) (Internet users grew to 200 million in 1999 from 40 million in 1996 and 90,000 in 1989).

D. Daimler-Benz AG's Filing of an Unrelated Trademark Infringement Lawsuit in Federal Court

The court of appeals also attached jurisdictional significance to various allegations made by Daimler-Benz AG and MBNA in a trademark infringement complaint filed in a federal court in Texas. The court's view that licensing a trademark to business partners in a State, and manufacturing goods bearing that trademark that are later sold within that State, is tantamount to conducting direct advertising in the forum – and has jurisdic-

tional significance – is inconsistent with the decisions of other courts. Several federal courts have recognized that "[t]he use of a trademark by a corporation's subsidiary is *not* a transaction of business by the parent company." *Williams* v. *Canon, Inc.*, 432 F. Supp. 376, 380 (C.D. Cal. 1977) (emphasis added); *Ameritec Corp.* v. *Ameritech Corp.*, 1986 WL 10702, at *6 (C.D. Cal. 1986) (use of trademark in national advertising, and potential to enforce trademark rights in forum, do not amount to "purposeful availment"); *General Motors Corp.* v. *Lopez de Arriortua*, 948 F. Supp. 656, 666 n.9 (E.D. Mich. 1996). Other courts, moreover, have held that national advertising "is insufficient to support a finding of transaction of business." *San Antonio Tel. Co.* v. *American Tel. & Tel. Co.*, 499 F.2d 349, 351 n.5 (5th Cir. 1974); accord *Consolidated Development Corp.* v. *Sherritt, Inc.*, 216 F.3d 1286, 1292 (11th Cir. 2000); *Armstrong* v. *Aramco Services Co.*, 746 P.2d 917, 922-23 (Ariz. App. 1987).

E. The Imputation to Daimler-Benz AG of MBNA's Texas Contacts

At all relevant times, MBNA was a "wholly owned but separately operated" U.S. subsidiary of DBNAC, which in turn was a "wholly owned but separately operated" U.S. subsidiary of Daimler-Benz AG. App., *infra*, 54a-55a. The court of appeals recognized that these entities were "formally separate" and "strictly observed corporate formalities" (*id.* at 20a, 21a); that the parties had stipulated that the corporations were "separately operated" (*id.* at 24a); that the distribution agreement between them expressly "disclaims an agency relationship" (*id.* at 23a); and that Daimler-Benz AG had submitted evidence showing that it had "never participated in the day-to-day conduct of MBNA's business." *Id.* at 24a; see also *id.* at 18a. Nevertheless, the court chose to impute to Daimler-Benz AG the activities of MBNA, relying largely on evidence of Daimler-Benz AG's corporate structure and "inter-corporate relations." App., *infra*, 18a-21a. That analysis raises additional conflicts deserving of this Court's attention.

As the court of appeals acknowledged, only if "the parent corporation exerts *such dominance and control* over its subsid-

iary that the subsidiary is *simply a conduit* through which the parent conducts its business" – a "degree of control" that is "greater than that normally associated with common ownership and directorship" – may a foreign parent company "be considered to be doing business through the local activities of its subsidiaries." App., *infra*, 16a (emphasis added). Courts traditionally examine a "variety of factors" to determine whether to pierce the corporate veil and treat one corporation as the "alter ego" of the other. *Id.* at 16a-17a (*e.g.*, adequate capitalization, separate books and records, separate "daily operations," and separate meetings of directors and shareholders).

Having acknowledged those traditional principles, however, the court of appeals proceeded to depart from them. It held that "the determination whether two corporate entities are one and the same" in the jurisdictional context is "distinct" from the alter ego inquiry in the context of imputed *liability*. App., *infra*, 17a n.5. The "operative question" in the context of personal jurisdiction, the court held, was "whether MBNA is in fact a mere 'division' or 'branch' of a larger whole." *Id.* (citing *Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir.1977)). Applying that standard, the court held that the separate corporate identities should be disregarded because Daimler-Benz AG is "devoted to selling its cars worldwide, including in Texas" and "[t]o achieve this goal" has "established subsidiaries in important markets around the globe"; because "MBNA essentially connects" Daimler-Benz AG "to markets in the U.S., including Texas"; and because Daimler-Benz AG and MBNA "form a functional whole in promoting and marketing vehicles in Texas." *Id.* at 20a-21a.

That analysis is squarely at odds with this Court's decision in *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925). The plaintiff in *Cannon* (a North Carolina company) initially sued a Maine corporation in North Carolina state court by for breach of contract. Plaintiff served a wholly owned subsidiary of the Maine corporation, which had an office in North Carolina and was "the instrumentality employed to market [the parent's] products in the state" (the subsidiary did

not market the product "as [the parent's] agent" but rather, like MBNA, purchased it from the parent and then sold it to dealers). *Id.* at 251. Although the parent "dominate[d]" the subsidiary "*immediately and completely*," this Court refused to disregard the "corporate separation" so "carefully maintained" through the keeping of separate books and the observation of all formalities of separate corporate existence. *Id.* at 251 (emphasis added). "The corporate separation," this Court reasoned, "though perhaps merely formal, was real. *It was not pure fiction.*" *Id.* (emphasis added).

Although decided before *International Shoe* and *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and based on federal common law rather than the Due Process Clause, *Cannon* has been followed by some courts faced with the issue of how to analyze whether a parent company can be haled into a distant forum where it does not do business based on the activities of a corporate subsidiary. See, *e.g.*, *Consolidated Development Corp.* v. *Sherritt, Inc.*, 216 F.3d 1286, 1293-94 (11th Cir. 2000) (applying *Cannon* rule); *I.A.M. Nat'l Pension Fund* v. *Wakefield Indus., Inc.*, 699 F.2d 1254, 1258-59 (D.C. Cir. 1983); *McPheron* v. *Penn Central Transp. Co.*, 390 F. Supp. 943, 948-56 (D. Conn. 1975) (applying *Cannon* rule and refusing to apply more lenient veil-piercing approach); see also *Gallagher* v. *Mazda Motor of Am.*, 781 F. Supp. 1079, 1083-84 & n.9 (E.D. Pa. 1992) (citing numerous cases that have followed *Cannon* and refused to impute contacts where "corporations observe and respect the corporate form").

Other courts, in contrast, have ruled that the *Cannon* standard was superseded by this Court's decision in *International Shoe*, see *Velandra* v. *Regie Nationale Des Usines Renault*, 336 F.2d 292, 296-97 (6th Cir. 1964), or by the dicta quoted above from *World-Wide Volkswagen*, see *In re Telectronics Pacing Systems, Inc.*, 953 F. Supp. 909, 917-18 (S.D. Ohio 1997) (citing cases). Some of these courts – including the Fifth Circuit – have applied traditional "alter ego" principles in examining whether to pierce the corporate veil between parent and subsidiary in determining issues of personal

jurisdiction. See, *e.g.*, *Alpine View Co.* v. *Atlas Copco AB*, 205 F.3d 208, 218-19 (5th Cir. 2000). See also Comment, *Jurisdiction Over a Corporation Based on the Contacts of a Related Corporation: Time for a Rule of Attribution*, 92 DICK. L. REV. 917, 925-37 (1988) (discussing additional "alter ego" cases and acknowledging divergence in approach used by lower courts). This Court recently reaffirmed that these "bedrock" principles of corporate law – including stringent standards governing piercing of the corporate veil – are "deeply ingrained in our economic and legal system" and should not lightly be disregarded. *United States* v. *Bestfoods*, 524 U.S. 51, 61-62 (1998).

The Texas Court of Appeals' decision conflicts with both of these lines of cases. It conflicts with *Cannon* because it pierces the corporate veil even though the formal separation between Daimler-Benz AG and MBNA was scrupulously maintained. And it conflicts with cases applying the "alter ego" doctrine because, as the lower court noted (App., *infra*, 17a n.5), those cases impose a *more stringent* standard than asking whether one corporation is a "mere 'division' or 'branch' of a larger whole." *Id.* Compare Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1, 40 (1986) ("to the extent that different standards should be used for jurisdictional standards than for substantive purposes, these standards should be more restrictive, not more lenient"). Indeed, the "alter ego" standards employed by Texas courts, under which the corporate veil could not possibly have been pierced in this case, appear to be far more exacting. In contrast, it is difficult to imagine *any* subsidiary corporation engaged in business relations with its parent company that would not qualify as a "division" or "branch" under the lower court's far-reaching logic.

Finally, the court's reliance on specific features of Daimler-Benz AG's "corporate structure" creates additional conflicts. For example, the court attached significance to the parent's use of "consolidated financial statements" that included MBNA's results. App., *infra*, 19a. But "[t]he cases are

unanimous that consolidated reporting is standard business practice and will not support jurisdiction in the absence of evidence establishing an agency relationship." *Sonora Diamond Corp.* v. *Superior Court*, 99 Cal. Rptr. 2d 824, 844 (Cal. App. 2000) (citing multiple cases). To resolve the foregoing conflicts, and bring greater clarity to an area of law where "[t]he lower courts are understandably confused" (Brilmayer & Paisley, 74 CALIF. L. REV. at 4), review should be granted.[5]

F. Fair Play and Substantial Justice

In evaluating "the second prong of the due process test," the Texas Court of Appeals applied a seven-factor test, examining: (1) "the burden on the defendant"; (2) "the interests of the forum state in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; (5) "the shared interest of the several states in furthering fundamental substantive social policies"; (6) "the procedural and substantive policies of other nations whose interests are affected"; and (7) "the federal government's interest in its foreign relations policies." App., *infra*, 26a-27a; see also *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 476-77 (1985) (stating that courts "may evaluate" factors 1-5 in "appropriate case[s]"). The last two factors apply because the defendant is a resident of another nation. See *Guardian Royal Exch. Assurance, Ltd.* v. *English China Clays,*

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[5] In imputing MBNA's activities to petitioner, the court of appeals also relied on the distribution agreement "in effect between Daimler-Benz [AG] and MBNA at the time of Karen Olson's accident." App., *infra*, 21a; see *id.* at 21a-24a; *id.* at 76a-94a. As explained below, however, the distribution agreement is a nothing more than a garden-variety exclusive distributorship contract. See pages 27-28, *infra*. For that reason, the court's decision to rely on the terms of the agreement conflicts, in result, with the many decisions holding that, "in the absence of an agency relationship, the acts of a distributor are not ordinarily attributable to a foreign manufacturer for purposes of establishing *general* jurisdiction." *Kuenzle* v. *HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 459 (10th Cir. 1996) (citing cases) (emphasis added).

P.L.C., 815 S.W.2d 223, 228-29 (Tex. 1991); see also *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102, 113-115 (1987). Applying this test, the Texas Court of Appeals concluded that the assertion of jurisdiction over Daimler-Benz AG comports with "fair play and substantial justice."

The court of appeals' analysis is inconsistent with *Asahi* and with the decisions of other courts. Other jurisdictions do not apply the same factors used by the Texas courts in evaluating "fair play and substantial justice." See 1 BUSINESS AND COMMERCIAL LITIGATION IN THE FEDERAL COURTS § 2.6, at 87 (1998) ("The circuits differ in their application of the relatedness analysis."); *Metropolitan Life Ins. Co.* v. *Robertson-Ceco Corp.*, 84 F.3d 560, 577-78 (2d Cir.) (Walker, J., dissenting) ("The sprouting like weeds of multi-pronged tests for the reasonableness inquiry in the circuits * * * has left this legal garden in disarray.") (citing cases), cert. denied, 519 U.S. 1006 (1996). For example, the Eleventh Circuit applies only three factors: (1) the burden on the defendant; (2) the interests of the forum; and (3) the plaintiff's interest in obtaining relief. *SEC* v. *Carrillo*, 115 F.3d 1540, 1547 (1997). The Eighth Circuit considers only two factors: (1) the interest of the forum State in providing a forum for its residents; and (2) the convenience of the parties. *Digi-Tel Holdings, Inc.* v. *Proteq Telecomm. (PTE), Ltd.*, 89 F.3d 519, 522-23 (1996). The Ninth Circuit applies a multi-factor test, which unlike the Texas test includes "the extent of [the defendant's] purposeful interjection" and "the existence of an alternative forum." *Amoco Egypt Oil Co.* v. *Leonis Navigation Co.*, 1 F.3d 848, 851 (1993).

The decision below is also inconsistent with this Court's decision in *Asahi* – and decisions of the federal circuits – in its cavalier treatment of the "procedural and substantive policies of other nations" and the "unique burdens" imposed on a non-U.S. corporation forced to defend litigation in a distant State. In *Asahi*, this Court instructed that "[i]n every case" involving an alien defendant, the interests of other countries "as well as the Federal interest in Government's foreign relations policies, will

be best served by *a careful inquiry* into the reasonableness of the assertion of jurisdiction." 480 U.S. at 115 (emphasis added); see also *id.* ("*Great care and reserve* should be exercised when extending our notions of personal jurisdiction into the international field.") (emphasis added) (internal quotations omitted); *id.* at 114-15 (burdens placed on alien defendant must be given "substantial weight"); accord, *e.g.*, *Amoco Egypt Oil Co.*, 1 F.3d at 852 ("the sovereignty barrier is high"). The Texas Court of Appeals, however, completely ignored the relevant comity concerns identified by Daimler-Benz AG: (1) Germany, not Texas, has an interest in determining the safety standards applicable to cars designed and contructed for the German market by a German manufacturer (and never sold in the United States); and (2) Germany takes a vastly different approach to product liability law, civil discovery, and civil trials (and has entered into several international conventions to shield its citizens from the burdens imposed by the American system).

Instead of evaluating these considerations, the court of appeals offered the following explanation:

> The federal government's foreign policy interests are not hindered when individual states ensure that large international companies operate in an equitable business environment in which wrongs are redressed by those responsible.

App., *infra*, 27a. The court also emphasized that Daimler-Benz AG "maintains * * * products liability insurance[] covering claims made against it worldwide," which the court presumed was "consonant with business policies in Germany." *Id.* The problem with this logic is that it simply knows no limits. The same can be said for *any* large foreign manufacturer. Indeed, even manufacturers who do not place *any* products into a stream of commerce terminating in Texas would be ill-advised, after the decision below, not to insure against product liability lawsuits brought against them in the Texas courts.

II. The Decision Below Is Incorrect

In addition to being inconsistent with the decisions of other courts, the Texas Court of Appeals' general jurisdiction

analysis and holding are seriously flawed. At every turn, the court relied on rationales that should invite skepticism for the simple reason that they have extremely broad applicability (and thus threaten to work a substantial and unwarranted expansion of state power over foreign corporations). The lower court's decision is wrong in multiple respects.

First, it erroneously treats the placement of products into a stream of commerce flowing into a State as *systematic and continuous* activity *within* the State. The "stream of commerce" theory, however, cannot be used to establish general (as opposed to specific) jurisdiction.

Second, the lower court incorrectly relied on Daimler-Benz AG's maintenance of a website that provides basic information about the company and its products, allows users anywhere in the world to send and receive email communications, but is not in any way specifically directed toward Texas consumers or used to transact sales of products to Texas residents. Contrary to the lower court's conclusion, the maintenance of what is by today's standards a rudimentary business website cannot possibly demonstrate – even in part – that a nonresident defendant is engaged in "continuous and systematic" activities within a State or purposefully availed itself of the benefits of the State's market. See *GTE New Media Services Inc.* v. *BellSouth Corp.*, 199 F.3d 1343, 1349-50 (D.C. Cir. 2000).[6]

With the rapid worldwide growth of the Internet and evolution of website technologies, moreover, "an increasing number of Web sites will necessarily adopt interactive features."

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[6] Perhaps sensing the potential of its logic to erase all due process limits on state jurisdiction, the court of appeals stated that, although the "level of interactivity" of the Daimler-Benz AG website "*might* not be enough" – "standing alone" – "to subject Daimler-Benz to jurisdiction in Texas," the court would "consider it a factor, along with the other contacts that exist in this case." App., *infra*, 25a (emphasis added). That equivocal assurance is cold comfort indeed. Not only does it leave open the possibility that a website of this kind *would* subject a nonresident defendant to general jurisdiction in Texas, but it essentially invites litigants in Texas to raise the issue in almost every case where general jurisdiction could conceivably be asserted.

Siddiqi, *Welcome to the City of Bytes?*, 14 N.Y. INT'L L. REV. 43, 73-74 (2001). For that reason, the *Zippo* "sliding scale" framework for analyzing Internet "contacts" – especially its intermediate category, where "the exercise of jurisdiction depends on the *level of interactivity*" (App., *infra*, 25a (emphasis added)) – is seriously flawed. See also American Bar Ass'n, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, 55 BUS. LAW. 1801, 1853-54 (2000) (criticizing *Zippo*); Siddiqi, 14 N.Y. INT'L L. REV. at 73-74 (noting that "the commercial value of a Web site is not necessarily dependent on [its] interactivity"). Unless corrected by this Court, the widespread use of this framework in Texas and other jurisdictions has the potential to eliminate all remaining due process limits on state adjudicatory authority over nonresident businesses.

Were other countries to assert *general* jurisdiction over U.S. companies on the same basis, there can be little doubt that Americans forced to litigate unlimited issues in foreign venues would cry foul. It is possible, for example, to access the website of Alderson Reporting <www.aldersonreporting.com>, from which transcripts of arguments before this Court can be ordered interactively, in Afghanistan, but one would hardly think that that fact supports an assertion of Afghani jurisdiction over Alderson in a lawsuit that is wholly unrelated to any contacts the company might have with that country.

Third, the court of appeals was wrong to rely (App., *infra*, 12a-16a) on the filing by Daimler-Benz AG and MBNA of an unrelated trademark infringement complaint in federal court in Texas several years after this case was initiated. Reliance on this consideration seriously interferes with the assertion of federal rights and frustrates the fundamental purposes underlying the Lanham Act, which include protection of the public from pawning off and other forms of consumer fraud. See 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:333 (1999). States may not exact as a "price" for asserting or enforcing federal rights that a party submit to the general jurisdiction of the state courts. See *Felder* v. *Casey*, 487 U.S.

131, 150-51 (1988) (holding similarly burdensome state rule preempted by federal law).[7]

Moreover, the act of filing a lawsuit is not "systematic" or "continuous" conduct. Nor is licensing trademarks to an indirect subsidiary for use with the subsidiary's sale of products pursuant to a nationwide distribution agreement. If the court of appeals were right that the mere "use" of a trademark (*i.e.*, the association of the mark with a product) is tantamount to "doing business" in Texas, then jurisdiction truly would follow the trademarked product wherever it traveled (a "stream of commerce" theory broader than that endorsed by *any* Member of this Court in *Asahi*).

Fourth, the court incorrectly imputed to Daimler-Benz AG the activities of its indirect subsidiary, MBNA. There is no valid basis to do so under this Court's decision in *Cannon* or the traditional alter ego doctrine. Internationalist rhetoric in a company's annual reports – such as Daimler-Benz AG's self-description "as an international company" which "does business in all corners of the globe" (App., *infra*, 19a-20a) – is not evidence of "continuous and systematic" activities in Texas. See <http://www.aldersonreporting.com/About/index.asp> (website of Alderson Reporting boasts that it is "the largest independent, woman-owned **worldwide** court reporting firm") (boldface in original). Equally mistaken was the court of appeals' reliance on MBNA's distribution agreement, which the court misread as reflecting an extraordinary degree of control by Daimler-Benz AG. In fact, the agreement contains many provisions conferring rights on MBNA, and the provisions favoring Daimler-Benz AG are routinely included in exclusive

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[7] The allegations relied on by the Texas Court of Appeals as a basis for asserting general jurisdiction were essential allegations of a Lanham Act claim that only petitioner, as the owner of federally registered trademarks, had standing to assert. See 1a GILSON, TRADEMARK PROTECTION AND PRACTICE § 8.03[1][a] (1990); 5 MCCARTHY, *supra*, § 32:3 (only trademark owner, not licensee, may sue for infringement). Unless a trademark owner vigorously asserts and defends its trademark rights, the owner may be found to have abandoned them. See 15 U.S.C. § 1114.

distributorship agreements. Compare *id.* at 21a-23a, 76a-94a with 1 GARNER, FRANCHISE & DISTRIBUTION LAW & PRACTICE §§ 1.11, 3.58 (1990) and GOLDSCHEIDER, ECKSTROM'S LICENSING IN FOREIGN AND DOMESTIC OPERATIONS PRACTICE §§ 3.1 to 3.39 (2001).

III. This Case Also Provides a Valuable Opportunity to Clarify the Scope of "Specific" Jurisdiction

In upholding general jurisdiction, the lower court did not reach respondents' argument that due process would permit "specific" jurisdiction in this case. App., *infra*, 26a. As noted above, "specific" jurisdiction may be exercised if the claims asserted "arise out of or relate to" the defendant's contacts with the forum. *Helicopteros Nacionales de Columbia, S.A.* v. *Hall*, 466 U.S. 408, 414 (1984). If review is granted, respondents will no doubt seek to defend the judgment below on this basis.

Respondents' far-reaching theory of "specific" jurisdiction *itself* raises an issue on which the circuits have long been in conflict. Respondents argued below that specific jurisdiction was appropriate because Daimler-Benz AG manufactured thousands of vehicles each year that were interjected into the "stream of commerce" flowing into Texas, and some of those other vehicles contained "presumably similar gas tanks" to the one used in the 500SE. Respondents argued that their "cause of action (about the gas tank's design) is at least '*related to*' all of the other contacts (the other cars and gas tanks) the defendant has with the forum)." Resp. Post-Submission Ltr. Br. 1.

Respondents' theory of "specific" jurisdiction hinges on an expansive understanding of the minimum nexus required between claims and forum contacts before specific jurisdiction may be exercised. In *Helicopteros*, this Court identified – but "decline[d] to reach"– this question as well as several related questions. See 466 U.S. at 415 n.10 (noting as well the questions whether "related to" is broader than "arising out of" and, if so, whether it is a proper basis for "specific" jurisdiction).

Following *Helicopteros*, substantial confusion arose in the lower courts over the meaning of this nexus requirement. This

confusion was already so great a decade ago that this Court granted review in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), to resolve a circuit conflict over it but disposed of the case on another ground. *Id.* at 588-89; No. 89-1647 Pet. for a Writ of Certiorari, at i; *Ticketmaster-New York, Inc.* v. *Alioto*, 26 F.3d 201, 206 (1st Cir. 1994). As the Second Circuit recently noted, the conflict in the lower courts has persisted, with "[s]ome Circuits" holding that "the conduct must be a proximate cause of the plaintiff's injury" whereas "[o]thers have held that it is sufficient if the defendant's conduct in the state is a 'but for' cause of the plaintiff's injury." *Chew* v. *Dietrich*, 143 F.3d 24, 29 (2d Cir.), cert. denied, 525 U.S. 948 (1998); see also 1 BUSINESS AND COMMERCIAL LITIGATION IN THE FEDERAL COURTS § 2.6, at 87 (1998) ("The circuits differ in their application of the relatedness analysis."). Many state courts have also struggled with this issue. See, *e.g.*, *Tatro* v. *Manor Care, Inc.*, 625 N.E.2d 549, 552-54 (Mass. 1994).

In recent years, moreover, several state high courts have endorsed *even broader* definitions of "relatedness" that go beyond both the "proximate cause" and "but for" tests. *E.g.*, *Shoppers Food Warehouse* v. *Moreno*, 746 A.2d 320, 333-36 (D.C.) (en banc) (adopting broad "substantial connection" test and upholding jurisdiction where "proximate cause" and "but for" tests could not be satisfied), cert. denied, 530 U.S. 1270 (2000); *Vons Cos.* v. *Seabest Foods, Inc.*, 926 P.2d 1085, 1096, 1102-12 (Cal. 1996) (adopting "substantial connection" test after rejecting "proximate" cause and "but for" approaches), cert. denied, 522 U.S. 808 (1997); *Domtar, Inc.* v. *Niagara Fire Ins. Co.*, 533 N.W.2d 25, 31 (Minn.) (adopting "substantial connection" test), cert. denied, 516 U.S. 1017 (1995). But see *Williams* v. *Lakeview Co.*, 13 P.3d 280, 283-85 (Ariz. 2000) (holding that assertion of personal jurisdiction in absence of "causal nexus" between defendant's contacts and plaintiff's claims violates due process, and rejecting *Moreno*); *id.* at 284 (noting that contrary holding would "obliterate the distinction between general and specific jurisdiction").

Commentators have also engaged in extended analysis of this issue. See, *e.g.*, Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 591-93 (2001) (summarizing debate). Indeed, two prominent scholars have even debated a hypothetical example closely analogous to this case: whether a State could exercise jurisdiction over a nonresident auto manufacturer whose cars are sold through a distributor in the State, in a case where the accident vehicle was purchased in a *different* State. Compare Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 660 (1988) (arguing that jurisdiction could be asserted because the manufacturer's forum conduct "is similar to, but not causally related to, the conduct that forms the basis for the cause of action"), with Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1459-64 (1988) (rejecting that approach as inconsistent with this Court's cases and riddled with administrative difficulties such as how to define product "similarity").

This case is an excellent vehicle for addressing this conflict. Because respondents' product liability claim does not "arise out of" any contacts between Daimler-Benz AG and Texas, it obviously flunks the "substantive relevance" test. Indeed, respondents may invoke specific jurisdiction only if "related to" is broader than "arises out of" *and* if the extremely broad interpretation adopted by certain lower courts ("substantial connection") is correct. See page 29, *supra*. This case accordingly provides a good opportunity to choose among the competing formulations, as well as to decide the questions that were expressly reserved in *Helicopteros* and left unresolved in *Shute*. Finally, the opportunity to address these questions in a case that *also* raises not only issues concerning the "stream of commerce" theory (whose limits would be largely erased by respondents' theory of "relatedness") but also issues of general jurisdiction makes this case an ideal vehicle for bringing greater uniformity and coherence to this vitally important area of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JUSTS N. KARLSONS
DAVID M. RICE
MATTHEW J. KEMNER
Carroll, Burdick & McDonough LLP
44 Montgomery Street
Suite 400
San Francisco, CA 94104
(415) 989-5900

JOE R. GREENHILL
Baker Botts, L.L.P.
98 San Jacinto Blvd.
Suite 1600
Austin, TX 78701-4039
(512) 322-2500

ALAN E. UNTEREINER*
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

DECEMBER 2001

APPENDICES

APPENDIX A

Texas Court of Appeals, Third District, at Austin

ON MOTION FOR REHEARING

No. 03-99-00114-CV

Daimler-Benz Aktiengesellschaft, Appellant

v.

Scott Olson, Individually and as Independent Executor of the Estate of Karen L. Olson, and Vickie Olson, Appellees

FROM THE DISTRICT COURT OF BELL COUNTY, 169TH JUDICIAL DISTRICT, NO. 158,786-C, HONORABLE RICK MORRIS, JUDGE PRESIDING

The opinion and judgment issued herein on March 23, 2000 are withdrawn, and the following opinion is substituted in lieu of the earlier one.

In this appeal, we consider the contacts with Texas of a foreign parent corporation that designs and manufactures cars abroad, but has established a North American subsidiary to import and distribute those cars in the United States, including Texas. Appellant Daimler-Benz Aktiengesellschaft (Daimler-Benz) brings an interlocutory appeal from the district court's order overruling its objection to personal jurisdiction. *See* Tex. R. Civ. P. 120a. The suit from which this appeal arises is a

products liability action brought against Daimler-Benz by appellees Scott Olson, the son of the decedent, Karen Olson, and executor of her estate, and Vickie Olson, Karen's daughter. We will affirm the district court's order.

FACTUAL AND PROCEDURAL BACKGROUND

Alleging that the Mercedes-Benz car Karen Olson was driving caught fire shortly after a van collided with it, causing Karen's death, the Olsons sued Daimler-Benz and the owner of the van, Central Produce Company of Temple, Texas. The accident occurred on April 3, 1995, in Temple, Texas. Scott and Vickie are Texas residents; the Mercedes-Benz Karen owned before her death was registered in Texas. The Olsons claimed that Daimler-Benz defectively designed and manufactured Karen's car, and that the defects caused her death. Daimler-Benz made a special appearance to challenge its amenability to suit in Texas. The district court overruled Daimler-Benz's objection, finding that jurisdiction over Daimler-Benz in Texas was proper.

Daimler-Benz is a German corporation with its principal place of business in Stuttgart, Germany. As shown in its annual reports, Daimler-Benz is a holding company with four corporate units: Mercedes-Benz, Daimler-Benz Industries, Daimler-Benz Aerospace, and Daimler-Benz InterServices. These units, which comprehend all subsidiary corporations of Daimler-Benz, form the Daimler-Benz Group. The Mercedes-Benz corporate unit accounts for a preponderant share of Daimler-Benz's profit; in 1994, the Daimler-Benz Group earned profits of 0.9 billion deutsche marks, while the Mercedes-Benz unit returned 1.8 billion deutsche marks, its earnings being offset by losses in other corporate units.[1] The Mercedes-Benz unit contains both

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[1] Daimler-Benz also reported its 1994 profits as 0.6 billion U.S. dollars. Using the same conversion rate, 1994 profits of the Mercedes-Benz unit would have been approximately $1.28 billion.

a passenger car division and a commercial vehicle division. In 1994, the Mercedes-Benz unit sold 592,400 passenger cars worldwide, 73,000 of these in the United States.

In 1995, the Daimler-Benz Group consisted of Daimler-Benz and its 319 domestic and foreign subsidiaries; in 1994, Daimler-Benz's subsidiaries numbered 357. Within the Mercedes-Benz corporate unit, subsidiaries apparently exist for every western European country, as well as for Brazil, Argentina, Nigeria, South Africa, Turkey, Iran, India, Japan, Indonesia, and Australia. In addition to establishing Mercedes-Benz of North America, Inc., Daimler-Benz has established Mercedes-Benz Canada, Inc., and Mercedes-Benz Mexico, S.A. de C.V.

Mercedes-Benz of North America, Inc. (MBNA) is the sole importer and distributor in the United States of Mercedes-Benz cars and parts. MBNA, a Delaware corporation with its principal place of business in Montvale, New Jersey, is a direct, wholly owned subsidiary of Daimler-Benz North America Corporation (DBNAC). DBNAC, also a Delaware corporation but with its principal place of business in New York City, is a direct, wholly owned subsidiary of Daimler-Benz.[2]

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[2] On July 1, 1989, Daimler-Benz transferred all of its motor vehicle business, as part of a business reorganization, to Mercedes-Benz Aktiengesellschaft. The transfer included all contractual rights and obligations relating to the automotive business, including distribution agreements. Mercedes-Benz Aktiengesellschaft was organized as a wholly owned subsidiary of Daimler-Benz, incorporated in Germany with its principal place of business in Stuttgart. On May 7, 1997, in a further business reorganization, Mercedes-Benz Aktiengesellschaft's rights and obligations were transferred back to Daimler-Benz. Mercedes-Benz Aktiengesellschaft then ceased to exist. In our discussion of Daimler-Benz's corporate organization and activities, we will treat the automotive business as if Daimler-Benz had always retained it.

In 1998, Daimler-Benz and Chrysler Corporation entered into a business combination resulting in the creation of DaimlerChrysler AG. Because this event occurred beyond the time-frame relevant to this appeal,

DISCUSSION

In two issues on appeal, Daimler-Benz contests the court's decision that Daimler-Benz is subject to the jurisdiction of Texas courts. A Texas court may exercise jurisdiction over a nonresident defendant if the Texas long-arm statute authorizes the exercise of jurisdiction and the exercise of jurisdiction comports with due process. *Guardian Royal Exch. Assurance, Ltd.* v. *English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991); *see* Tex. Civ. Prac. & Rem. Code Ann. § 17.042 (West 1997 & Supp. 2000). The broad language of the long-arm statute permits an expansive reach, limited only by the federal constitutional requirements of due process. *Schlobohm* v. *Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990). As a result, we consider only whether it is consistent with federal due process for Texas courts to assert personal jurisdiction over Daimler-Benz. *Guardian Royal*, 815 S.W.2d at 226.

The federal due process clause protects a person's liberty interest in not being subject to binding judgments of a forum with which that person has established no meaningful contacts, ties, or relations. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 471-72 (1985) (citing *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945)). Under the federal constitutional test of due process, a state may assert personal jurisdiction over a nonresident defendant only if the defendant has purposefully established minimum contacts with the forum state and the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *Id.* at 476. The ultimate test of minimum contacts is whether the defendant purposefully availed itself of the privilege of conducting activities in Texas, thereby invoking the benefit and protection of Texas laws. *Schlobohm*, 784 S.W.2d at 357-58. This requirement ensures that a nonresident defendant will be haled into court only as a result of its intentional activities, so that it

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we do not consider it in our analysis.

is reasonable for the nonresident defendant to expect the call of a Texas court. *Guardian Royal*, 815 S.W.2d at 226; *Schlobohm*, 784 S.W.2d at 357-58.

The minimum contacts analysis has been refined into two types of jurisdiction – general and specific. Specific jurisdiction exists when the cause of action arises out of or relates to the nonresident defendant's contacts with the forum state. *Guardian Royal*, 815 S.W.2d at 230. The defendant's activities must have been purposefully directed toward the forum state. *Id.* at 228. Under specific jurisdiction, the minimum contacts analysis focuses on the relationship among the defendant, the forum, and the litigation. *Id.*

General jurisdiction exists when the defendant's contacts with the forum state are continuous and systematic, even if the cause of action does not arise from or relate to activities conducted within Texas. *Id.* For general jurisdiction, the minimum contacts analysis is more demanding, requiring a showing of substantial activities within the forum state. *Schlobohm*, 784 S.W.2d at 357.

The existence of personal jurisdiction is a question of law, but proper exercise of that jurisdiction must sometimes be preceded by the resolution of underlying factual disputes. We determine the appropriateness of the trial court's resolution of those disputes by an ordinary sufficiency of the evidence review based on the entire record. *Conner* v. *ContiCarriers & Terminals, Inc.*, 944 S.W.2d 405, 411 (Tex.App–Houston [14th Dist.] 1997, no writ). If the trial court's order is based on undisputed or otherwise established facts, we conduct a de novo review of the order. *Id.* A defendant who challenges a court's exercise of personal jurisdiction through a special appearance carries the burden of negating all bases of personal jurisdiction. *Kawasaki Steel Corp.* v. *Middleton*, 699 S.W.2d 199, 203 (Tex. 1985); *Siskind* v. *Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 438 (Tex. 1982); *Nikolai* v. *Strate*, 922 S.W.2d 229, 236 (Tex.

App.–Fort Worth 1996, writ denied); *Hayes* v. *Wissel*, 882 S.W.2d 97, 99 (Tex. App.–Fort Worth 1994, no writ).

When a trial court overrules a special appearance, the defendant should request findings of fact under Texas Rule of Civil Procedure 296. *Runnells* v. *Firestone*, 746 S.W.2d 845, 849 (Tex. App.–Houston [14th Dist.]), *writ denied per curiam*, 760 S.W.2d 240 (Tex. 1988). Because the trial court made no findings in this case, all facts necessary to support its judgment are implied. *Worford* v. *Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *In re W.E.R.*, 669 S.W.2d 716, 716-17 (Tex. 1984); *Runnells*, 746 S.W.2d at 848. When a complete reporter's record exists, however, these implied findings are not conclusive and an appellant may challenge the sufficiency of the evidence to support them. *Roberson* v. *Robinson*, 768 S.W.2d 280, 281 (Tex. 1989). When such points are raised, the standard of review to be applied is the same as that to be applied in the review of jury findings or a trial court's findings of fact. *Id.*

Thus, we will set aside a finding of the trial court only if the finding is so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. *In re King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951); *Runnells*, 746 S.W.2d at 849. In reviewing such a point of error, we must consider and weigh all of the evidence, both the evidence that tends to prove the existence of a vital fact as well as evidence that tends to disprove its existence. *Ames* v. *Ames*, 776 S.W.2d 154, 158-59 (Tex. 1989); *Cain* v. *Bain*, 709 S.W.2d 175, 176 (Tex. 1986). So considering the evidence, if a finding is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust, the finding should be set aside, regardless whether some evidence supports it. *Watson* v. *Prewitt*, 320 S.W.2d 815, 816 (Tex. 1959); *King's Estate*, 244 S.W.2d at 661.

If evidence supports the implied findings of fact, we must uphold the trial court's judgment on any legal theory supported

by the findings. *Worford*, 801 S.W.2d at 109; *Point Lookout West, Inc.* v. *Whorton*, 742 S.W.2d 277, 278 (Tex. 987); *Runnells*, 746 S.W.2d at 848. This is so regardless of whether the trial court articulates the correct legal reason for the judgment. *Harrington* v. *Railroad Comm'n*, 375 S.W.2d 892, 895 (Tex. 1964); *Fish* v. *Tandy Corp.*, 948 S.W.2d 886, 891-92 (Tex. App.–Fort Worth 1997, pet. denied); *Marifarms Oil & Gas, Inc.* v. *Westhoff*, 802 S.W.2d 123, 125 (Tex. App.–Fort Worth 1991, no writ). We review the legal conclusions supporting the judgment to determine whether they are correct as a matter of law. *Lawrence* v. *Kohl*, 853 S.W.2d 697, 699 (Tex. App.–Houston [1st Dist.] 1993, no writ).

AFFIDAVITS

Before the pretrial hearing on Daimler-Benz's objection to jurisdiction, the Olsons filed two affidavits in support of jurisdiction – the affidavits of Susan Tarver and Mark Einfalt. Daimler-Benz filed written objections to these affidavits at the conclusion of the hearing. After considering the objections, the trial court overruled them. We review the trial court's evidentiary rulings on Tarver's and Einfalt's affidavits for an abuse of discretion. *St. Paul Fire & Marine Ins. Co.* v. *Confer*, 956 S.W.2d 825, 831 (Tex. App.–San Antonio 1997, pet. denied). An abuse of discretion occurs when a court acts without reference to guiding rules or principles, or acts arbitrarily or unreasonably. *Downer* v. *Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985).

The Olsons argue that Tarver's affidavit qualifies as a record of regularly conducted activity and is admissible under the business record exception to the rule against hearsay. *See* Tex. R. Evid. 803(6). The foundation for the business record exception has four requirements: (I) the record was made and kept in the course of regularly conducted business activity; (ii) it was the regular practice of the business activity to make the record; (iii) the record was made at or near the time of the event

that it records; and (iv) the record was made by, or from information transmitted by, a person with knowledge; the person with knowledge must have acted in the regular course of business, or as it is sometimes put, must have had a business duty to report. *See* Steven Goode, Olin Guy Wellborn III, & M. Michael Sharlot, *Courtroom Handbook on Texas Evidence,* Authors' Commentary 407-08 (1994).

Tarver is the west coast manager of Port Import Export Reporting Service (PIERS), a division of *The Journal of Commerce.* PIERS operates a database that tracks all imports and exports transacted through U.S. ports. The Freedom of Information Act in conjunction with the U.S. Customs regulations authorizes press organizations to copy certain official shipping documents, such as manifests and bills of lading, and make them available to the public. The 125 reporters mentioned in Tarver's affidavit collect import and export information from all U.S. ports as contained on bills of lading, vessel manifests, and other official shipping documents submitted by steamship companies to the U.S. Customs Service. Additionally, PIERS has access to U.S. Customs' Automated Manifest System data tapes. These official shipping documents are made at or near the time by (or from information transmitted by) a person with knowledge and are kept in the course of regularly conducted shipping activity. It is the regular practice of the shipping industry, as required by federal law, to keep such records and information. Further, after collecting the data from these sources, the staff of PIERS regularly verifies that the information in its database is accurate. The trial court did not abuse its discretion in finding that Tarver's affidavit satisfies the foundational requirements of the business records exception.

Additionally, publications of market prices or statistical compilations that are proven to be generally recognized as reliable and regularly used in a trade or specialized activity by persons so engaged are admissible for the truth of the matter published. Tex. R. Evid. 803(17); *Curran* v. *Unis*, 711 S.W.2d

290, 296-97 (Tex. App.–Dallas 1986, no writ) (citing *Lewis* v. *Southmore Savs. Ass'n*, 480 S.W.2d 180, 186 (Tex. 1972)). Tarver testified that the information in the PIERS database is relied upon by the public, U.S. Customs Service, U.S. Trade Development Offices, and other U.S. agencies, in addition to commercial offices of foreign governments, commercial banks and currency dealers, port authorities, consultants, equipment manufacturers, freight forwarders, importers and exporters, law firms, and manufacturers. PIERS information is regarded by these governmental agencies and private entities as accurate and reliable in the same way as reports of interest rates posted in *The Wall Street Journal.* The exception to the hearsay rule for published compilations generally used and relied on by persons in particular occupations also supports the admission of Tarver's affidavit.

Mark Einfalt's affidavit contains as attachments pleadings and discovery submitted in this case, Daimler-Benz's and DBNAC's annual shareholder reports from 1990 through 1995, information from the web sites of Daimler-Benz, DBNAC, and MBNA, and several commercial reports. Daimler-Benz argues that the attachments are not properly identified and authenticated. Einfalt averred that, within his personal knowledge, the attachments are accurate copies of the original documents; Einfalt then identified the attachments. This testimony properly authenticates the attachments. Tex. R. Evid. 901(b)(1). Daimler-Benz's argument that documents printed from web sites must be authenticated by testimony establishing the system from which the printouts were obtained and the accuracy of the printouts was not presented to the trial court, and we do not consider it. Tex. R. App. P. 33.1(a).

Daimler-Benz also states globally that the commercial reports and web site documents attached to Einfalt's affidavit constitute hearsay. Assuming the trial court erroneously admitted these documents, however, Daimler-Benz fails to explain how their admission probably caused the rendition of an

improper judgment. *See id.* 44.1(a). In addition, Daimler-Benz offers no argument that distinguishes among these documents. The documents showing their source as Daimler-Benz's web site, for instance, merit a different analysis than those labeled as commercial reports. Daimler-Benz's contention is too general to require us to search for error. We therefore decline to hold that the trial court abused its discretion in admitting Einfalt's affidavit and its attachments.

PERSONAL JURISDICTION

Minimum Contacts

Daimler-Benz contends that it lacked the systematic and continuous contacts with Texas required to confer general jurisdiction on Texas courts. We will examine the record for evidence of Daimler-Benz's activities in 1996, when the Olsons filed suit, and for a reasonable time before 1996. Our review will include evidence of Daimler-Benz's allegations in a federal lawsuit, the corporate structure of Daimler-Benz, its distribution agreement with MBNA, and its Internet web site.

Daimler-Benz presented evidence that it has never been authorized to do business and has never done business in Texas, has no officers, agents, or employees in Texas, does not own or possess any office, plant, or warehouse in Texas, and has no equipment, inventory, or books and records in Texas. Further, Daimler-Benz offered evidence that it has no mailing address, telephone listing, bank account, or other real or personal property in Texas. It has never appointed an agent for service of process in Texas and has never sold Mercedes-Benz cars in the U.S.

Daimler-Benz and the Olsons stipulated to certain facts in the trial court. They agreed that MBNA buys U.S.-version Mercedes-Benz vehicles in Germany from Daimler-Benz. MBNA ships those vehicles to U.S. ports of entry and then to

various vehicle preparation centers, which MBNA owns or leases and operates. MBNA also ships parts it has bought from Daimler-Benz in Germany to U.S. ports of entry and then to parts distribution centers, which MBNA owns or leases and operates. Daimler-Benz and MBNA have executed a distribution agreement, which grants MBNA the exclusive right to import and distribute U.S.-version Mercedes-Benz passenger cars and parts for the U.S. The agreement also licenses MBNA to use certain Daimler-Benz trademarks. Daimler-Benz designs and manufactures U.S.-version Mercedes-Benz vehicles to comply with applicable federal and state regulations so that they can be certified as compliant and sold to MBNA in Germany for marketing and distribution by MBNA in the U.S., including the state of Texas. Vehicles not intended for sale to MBNA are not necessarily so designed, manufactured, or certified.

The parties also agreed that the 1980 Mercedes-Benz 500SE Karen Olson was driving when the collision occurred was not a U.S.-version vehicle. The car was first sold to a customer in Stuttgart, Germany; neither Daimler-Benz nor any of its subsidiaries played any role in importing the car to the U.S. The car was designed and manufactured by Daimler-Benz in Germany for the European marketplace; it was not designed for the U.S., was not sold to a Daimler-Benz subsidiary for export to the U.S., and was not marketed in or placed by Daimler-Benz in a stream of commerce destined for the U.S. Daimler-Benz does, however, design, manufacture, and sell vehicles in a stream of commerce intended for the U.S. market, including the state of Texas.

Further, the parties stipulated that Daimler-Benz has never advertised the sale of Mercedes-Benz vehicles in Texas; rather, MBNA and its local, authorized dealers advertise U.S. version Mercedes-Benz vehicles for sale in Texas. Neither entity advertises the sale of non-U.S. version Mercedes-Benz vehicles in Texas.

The parties' stipulations amount to judicial admissions, which normally are conclusive on the party making them. *See Mendoza* v. *Fidelity & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980). Although evidence controverting an admission is barred, a party relying on the admission must protect the record by objecting to the introduction of controverting evidence. *Marshall* v. *Vise*, 767 S.W.2d 699, 700 (Tex. 1989); *Houston First Am. Savs.* v. *Musick*, 650 S.W.2d 764, 769 (Tex. 1983). In this case, the Olsons submitted as evidence before the trial court the petition filed by Daimler-Benz and MBNA in 1998 in a Texas federal district court. *See Daimler-Benz Aktiengesellschaft* v. *Moghimi*, No. 3-98 Civ. 1308-H (N.D. Tex. Aug. 18, 1998).[3] Pleadings in another case that are inconsistent with a party's position in a present action are quasi-admissions, which are treated as some evidence. *DowElanco* v. *Benitez*, 4 S.W.3d 866, 871 (Tex. App.–Corpus Christi 1999, no pet. h.). We will set out the relevant allegations Daimler-Benz made in its petition in federal court before addressing the inconsistencies.

1. Daimler-Benz's Federal-Court Petition

In its federal-court petition, Daimler-Benz and MBNA sued Ray Moghimi, a car dealer in Dallas, for unlawfully using federally registered trademarks and service marks. Daimler-Benz stated in the petition that it owned, and had registered in the United States Patent and Trademark Office, the famous trademarks and service marks Mercedes-Benz and the design of a three-pointed star. Daimler-Benz alleged that it had continuously, over many decades, used its trademarks and service marks throughout the state of Texas to identify and distinguish its cars, parts, accessories, and related products, as well as the maintenance and repair services furnished by its

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[3] Although Daimler-Benz and MBNA filed the petition in *Moghimi* in 1998, their allegations cover activities that occurred during the time relevant to our analysis, 1996 and a reasonable time beforehand.

licensed dealers. Numerous Mercedes-Benz cars, parts, and accessories, and extensive maintenance and repair services, have been advertised and furnished under these marks by authorized dealers in Texas. Daimler-Benz and MBNA have spent large sums of money to use, promote, and advertise the trademarks and service marks in commerce, with the result that the marks have attained "extraordinary fame and inestimable good will" and now rank among the most distinctive marks in Texas. Because of their long and extensive use, Daimler-Benz and MBNA's marks have become recognized by the public as identifying Daimler-Benz and MBNA and the quality cars, parts, accessories, and services sold by them and their authorized dealers. The excellence of these products and services has earned Daimler-Benz and MBNA "a valuable reputation and tremendous goodwill" with the public, symbolized by the trademarks and service marks. Daimler-Benz and MBNA alleged that by unlawfully using the trademarks and service marks, Moghimi had engaged in unfair competition, had intended to injure their business operations, and had injured their business reputation and interfered with their advantageous business relationships.

The allegations of the petition conflict with the parties' stipulations as to Daimler-Benz's advertising: while the parties stipulated that Daimler-Benz itself has never advertised Mercedes-Benz vehicles in Texas, Daimler-Benz pleaded in federal court that it had spent large sums of money to advertise its trademarks and service marks, with the result that its marks had attained inestimable good will and now ranked among the most distinctive in Texas. Because Daimler-Benz failed to object to the controverting statement on the ground that it was relying on the stipulation, it has waived its right to rely on the stipulation. *Marshall*, 767 S.W.2d at 700. The controverted stipulation as to advertising is thereby reduced to the status of a quasi-admission, which is not conclusive, but is merely some evidence for the fact finder to consider. *See Mendoza*, 606 S.W.2d at 694. The allegations in the federal-court petition as

to advertising, being likewise controverted, also remain quasi-admissions. *DowElanco*, 4 S.W.3d at 871.

2. Judicial Admissions

The remaining allegations in Daimler-Benz's petition in federal court, summarized, are that Daimler-Benz owned and had registered in this country certain trademarks and service marks; that Daimler-Benz had long used its marks throughout Texas to identify its cars; that this long and extensive use had caused the public to recognize the marks as identifying Daimler-Benz and the cars it sold; that the excellence of the cars had earned Daimler-Benz a valuable reputation and tremendous goodwill, which were symbolized by its marks; and that the unlawful use of its marks constituted unfair competition, was intended to injure Daimler-Benz's business operations, and had injured its business reputation and interfered with its business relationships. As stated, pleadings in another case that are inconsistent with a party's position in a present action are quasi-admissions. *Id.* If certain conditions are met, however, quasi-admissions can rise to the level of formal judicial admissions. *Mendoza*, 606 S.W.2d at 694; *DowElanco*, 4 S.W.3d at 871. The policy underlying this rule is that it would be unjust to allow a party to recover after it has negated its right to recover by clear, unequivocal evidence. *Mendoza*, 606 S.W.2d at 694; *DowElanco*, 4 S.W.3d at 871.

To be treated as judicial admissions, quasi-admissions must meet five criteria: (1) the statements relied on were made during the course of a judicial proceeding; (2) the statements are contrary to an essential fact embraced in the theory of recovery or defense asserted by the person making the statements; (3) the statements were deliberate, clear, and unequivocal; (4) giving conclusive effect to the statements will be consistent with the policy on which the rule is based; and (5) the statements are not also destructive of the opposing party's theory of recovery. *Mendoza*, 606 S.W.2d at 694; *United States Fidelity & Guar.*

Co. v. *Carr*, 242 S.W.2d 224, 229 (Tex. Civ. App.–San Antonio 1951, writ ref'd).

The statements we have summarized were made in a judicial proceeding, are contrary to Daimler-Benz's assertion here that it lacks contacts with Texas, and are not destructive of the Olsons' theory of recovery. Further, the statements deliberately and unequivocally recount Daimler-Benz's activities in propagating its trademarks and service marks throughout Texas. Giving conclusive effect to these statements is consistent with the policy that a party should not be allowed to prevail on its assertions after clearly negating those assertions before a judicial tribunal. Because the allegations in Daimler-Benz's federal-court petition meet the requirements for being considered judicial admissions, Daimler-Benz is bound by those allegations in this suit.[4] We therefore consider it established that Daimler-Benz's long and extensive use in Texas of its trademarks and service marks has caused the public to identify the marks with Daimler-Benz and the cars it produces. The excellence of its cars has earned Daimler-Benz a valuable reputation with the public, which is also symbolized by its marks. It is necessarily implied from Daimler-Benz's allegations that it has engaged in competition and has established business relationships and business operations in Texas. *See Hutcherson* v. *Sovereign Camp, W.O. W.*, 251 S.W. 491, 492 (Tex. 1923) (trial court may find inferential facts that, as matter of law, are necessarily inferred from facts judicially admitted); *Davis* v. *State*, 904 S.W.2d 946, 950-51 (Tex. App.–Austin 1995, no writ). Thus, the allegations show that Daimler-Benz used its marks in Texas to create recognition for

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[4] Daimler-Benz stated in the federal-court petition that the public recognizes its marks as identifying it and MBNA "and the automobiles, parts, accessories and maintenance, repair and related services sold and furnished by [Daimler-Benz and MBNA] and their authorized dealers." Because Daimler-Benz did not allege that it sold cars directly to U.S. buyers, we do not consider this allegation to contradict the system of distribution stipulated to by the parties.

itself as part of a system of marketing its vehicles in Texas. Daimler-Benz established business operations in Texas and competed in the Texas marketplace for vehicle sales. Daimler-Benz's marketing system, which also involved its subsidiary MBNA and numerous dealerships, had economic value, which Daimler-Benz acted to protect by resort to the judicial system.

3. Alter Ego

Generally, a foreign parent corporation is not subject to the jurisdiction of a forum state merely because its subsidiary is present or doing business there. But if the parent corporation exerts such dominance and control over its subsidiary that the subsidiary is simply a conduit through which the parent conducts its business, the parent may be considered to be doing business through the local activities of its subsidiaries. *Jones* v. *Beech Aircraft*, 995 S.W.2d 767, 771 (Tex. App.–San Antonio 1999, pet. dism'd w.o.j.); *Moffett* v. *Goodyear Tire & Rubber Co.*, 652 S.W.2d 609, 613 (Tex. App.–Austin 1983, writ ref'd n.r.e.). The degree of control exercised by the parent must be greater than that normally associated with common ownership and directorship. *Conner*, 944 S.W.2d at 419.

Courts must examine all relevant circumstances to determine whether the parent and subsidiary should be considered separate or joined; a variety of factors have guided courts in making this determination: whether distinct and adequately capitalized financial units are incorporated and maintained; whether daily operations of the two corporations are separate; whether formal barriers between the management of the two entities are erected, with each functioning in its own best interest; whether the two file consolidated tax returns; whether operating capital is financed by the parent or borrowed from other sources; whether the subsidiary's stock is owned by the parent; whether the two share common officers and directors; the extent to which separate books and accounts are kept; whether both have common departments of businesses;

whether they have separate meetings of shareholders and directors; whether an officer or director of the one corporation is permitted to determine the policies of the other; whether those with whom the corporation comes into contact are apprised of their separate identity; and the extent to which contracts between the parent and subsidiary favor one over the other. *Conner*, 944 S.W.2d at 419; *Moffett*, 652 S.W.2d at 613. The Olsons bore the burden of proving the type of close relationship that would enable the court to disregard the separate corporate structures. *Jones*, 995 S.W.2d at 771.

Not all of the above factors need be present or considered. In *Jones*, the court of appeals analyzed the relationship between a parent corporation and its two subsidiaries and focused on several factors indicating that the corporations should be considered as one for purposes of personal jurisdiction: the corporations shared common ownership, officers, and directors; the parent exercised control over the daily operations of the subsidiaries; and the clients of the subsidiaries were not apprised of the separate identity of each entity. 995 S.W.2d at 772-73. Additionally, the court described one subsidiary as existing solely to funnel sales to the parent and the other as directing customers to the parent for sales. *Id.* at 772.[5]

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[5] Although many of the factors relevant to our analysis may also be relevant in determining whether a parent corporation should be liable for the actions of its subsidiary, the determination whether two corporate entities are one and the same for jurisdictional purposes is distinct. *See Jones*, 995 S.W.2d at 771; *Hargrave* v. *Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir.1983); *Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F.2d 406, 425 (9th Cir.1977). The operative question here is whether MBNA is in fact a mere "division" or "branch" of a larger whole, such that MBNA's contacts with Texas should be attributed to Daimler-Benz. *See Wells Fargo & Co.*, 556 F.2d at 425.

a. Corporate Structure and Inter-Corporate Relations

Daimler-Benz submitted evidence that it and MBNA have separate officers and directors and that the two corporations have always formally maintained their separate corporate existences. Daimler-Benz has always kept its books, records, tax returns, and financial statements separate from those of MBNA. All real and personal property that MBNA uses or controls has been owned by it or leased by it from parties other than Daimler-Benz.

Undisputed evidence in the record shows that MBNA does business in Texas. The parties stipulated that MBNA is qualified to do business in Texas. As mentioned above, the parties stipulated that MBNA advertises U.S.-version Mercedes-Benz cars for sale in Texas; MBNA's advertising appears in publications and newspapers directed to Texas and is broadcast over television and radio stations throughout Texas. The evidence shows that MBNA, as the exclusive U.S. distributor of Mercedes-Benz cars, selects its Mercedes-Benz dealers and forms contractual relationships with them. MBNA also supervises the performance of the dealers, has authority to terminate dealers, and handles the detailed accounting and record-keeping associated with the dealers. MBNA's dealer network extends throughout the U.S., including the state of Texas. The parties agreed that up until 1995, MBNA shipped Mercedes-Benz cars from Germany to the Houston Port Authority, from which point the cars were transported to a vehicle preparation center near Houston. Documents admitted in evidence show that from 1987 through 1990, MBNA imported more than 18,400 Mercedes-Benz vehicles into Texas through the Port of Houston. In 1995, 40,609 Mercedes-Benz vehicles from model years 1985 through 1995 were in operation in Texas. To the extent Daimler-Benz disputes that MBNA does business in Texas, MBNA's pleadings as co-plaintiff in *Moghimi* constitute an admission that MBNA competes in the Texas marketplace and has established business relationships,

a business reputation, and business operations in Texas. Following our analysis above, we consider these admissions to be judicial admissions.

The Olsons submitted in evidence Daimler-Benz's annual shareholder reports for the years 1990 to 1995. These show that financing for companies within the Daimler-Benz Group is handled by Daimler-Benz and its regional finance companies; the finance companies procure funds on national and international markets and pass the funds on to the operating companies. Daimler-Benz also arranges at least some aspects of purchasing for its operating companies.

In the section of Daimler-Benz's 1992 through 1994 annual shareholder reports titled, "The Corporate Principles of Daimler-Benz," Daimler-Benz described itself as an international company and wrote, "Daimler-Benz does business in all corners of the globe." In a speech given in October 1997, the chairman and chief executive officer of MBNA described MBNA as "the organization that links our parent company in Germany and our 320 dealers across the United States." Daimler-Benz considers the U.S. to be its largest foreign market. In Daimler-Benz's annual shareholder reports from 1990 through 1995, management's business review consistently discussed sales of Mercedes-Benz cars in the U.S. in terms of "our" sales and the number of cars "we" sold.

The financial statements are presented primarily on a consolidated basis for the entire Daimler-Benz Group, although certain figures are reported separately for Daimler-Benz. This format was adopted in the 1992 report, when the chairman of Daimler-Benz's board of management stated that the company would concentrate on the consolidated financial statements, rather than Daimler-Benz's individual performance, to reflect the growing internationalization of the company. Notes to the consolidated financial statements in the 1992 report say that

profits earned by subsidiaries of Daimler-Benz are added to consolidated retained earnings.

Although Daimler-Benz and MBNA do not appear to be managed by the same individuals, Daimler-Benz describes itself as the "managing holding company" of the Daimler-Benz Group, and one member of Daimler-Benz's Board of Management is shown in the 1994 shareholder report as being responsible for Daimler-Benz's subsidiaries. The companies within the Daimler-Benz Group contribute remuneration each year to the members of Daimler-Benz's Board of Management. Among its principal subsidiaries, Daimler-Benz classifies MBNA as a sales company, rather than a finance, manufacturing, holding, or service company. Although not mentioning MBNA specifically, Daimler-Benz related in its 1993 shareholder report that in the context of subsidiary administration, it followed and assessed ongoing projects of subsidiary companies and drafted decisions for the "internal bodies."

As discussed more fully below, Daimler-Benz requires MBNA to display Daimler-Benz's trademarks, including its three-pointed star. This well-known trademark, valuable to Daimler-Benz in promoting sales of its cars, does not allow customers to distinguish Daimler-Benz from its subsidiary MBNA or the numerous authorized dealers in Texas.

Our review of this evidence shows Daimler-Benz as a company devoted to selling its cars worldwide, including in Texas. To achieve this goal, Daimler-Benz has established subsidiaries in important markets around the globe. Although Daimler-Benz strictly observes corporate formalities, MBNA essentially connects Daimler-Benz to markets in the U.S., including Texas. Daimler-Benz holds itself out to investors as a corporation that does business in all corners of the globe. MBNA's classification as a sales company demonstrates that its function is to generate sales for Daimler-Benz. The confusion

of identity created by MBNA's use of Daimler-Benz's three-pointed star is some evidence that Daimler-Benz is doing business through MBNA. Daimler-Benz also exercises significant functions for MBNA and its other subsidiaries, such as obtaining financing and coordinating purchasing. Further, the management of Daimler-Benz closely supervises and directs the activities of its subsidiaries. Thus, while formally separate, Daimler-Benz and MBNA form a functional whole in promoting and marketing vehicles in Texas.

b. Distribution Agreement

The distribution agreement in effect between Daimler-Benz and MBNA at the time of Karen Olson's accident was submitted to the trial court as an attachment to the parties' stipulations. As a part of the parties' stipulations, the agreement carries the weight of a judicial admission. By means of the distribution agreement, Daimler-Benz conferred on MBNA the exclusive right to distribute within the U.S. passenger cars and parts manufactured by Daimler-Benz for the U.S. market. The agreement obligates MBNA to strive for maximum imports and sales of Mercedes-Benz vehicles. The agreement also gives Daimler-Benz the right, in a number of situations, to determine the details of MBNA's daily operations. Under the agreement, MBNA must inform Daimler-Benz of the prices it charges buyers and dealers, and on Daimler-Benz's request, MBNA must determine its sales prices in consultation with Daimler-Benz. To maximize imports and sales, Daimler-Benz has the right to determine, together with MBNA, purchase figures and planning schedules; if the parties cannot agree, the figures determined by Daimler-Benz apply. If the parties cannot agree on the minimum quantity of vehicles MBNA must keep in stock, Daimler-Benz can determine the minimum quantity. Likewise, in the absence of agreement, Daimler-Benz determines the number and assortment of demonstration vehicles MBNA must keep in stock. When MBNA performs warranty work, it must submit the warranty claim to Daimler-

Benz and keep the parts that have been replaced. Daimler-Benz is entitled to examine the claim and the parts to determine whether the claim was justified. MBNA must report regularly to Daimler-Benz on all advertising and sales promotions it and its dealers adopt and must report on their results, including a statement of expenditures and copies of the sales materials. Daimler-Benz may pass on to other general distributors any sales and promotional materials remitted by MBNA. Daimler-Benz reserves the right under the agreement to demand that MBNA discontinue or alter its advertising and canvassing activities. If MBNA is unable to conclude a transaction, it must inform Daimler-Benz so that Daimler-Benz can help with the transaction. MBNA must submit its annual balance sheet and earnings statement to Daimler-Benz so that Daimler-Benz can advise MBNA on business management. Daimler-Benz can at any time send a representative to the U.S., whom MBNA must help to carry out his assignment, in particular by supplying information and permitting records to be inspected. Daimler-Benz must agree to the design of all documents bearing MBNA's name.

The distribution agreement also authorizes Daimler-Benz to impose its standards on MBNA throughout MBNA's management and operations. The stock of vehicles that MBNA agrees to maintain must be organized according to Daimler-Benz's principles. MBNA must maintain showrooms that are "commensurate with the prestige of" Daimler-Benz. MBNA is to organize its sales network to conform with Daimler-Benz's standards relating to the size and equipping of sales premises, work organization and planning systems, and the use of data processing systems recommended by Daimler-Benz. MBNA is responsible for training its personnel in sales, service, parts systems, and business management and organization to conform with Daimler-Benz's standards. MBNA also agrees to provide servicing, maintenance and repair work for Mercedes-Benz vehicles in conformance with Daimler-Benz's standards. As part of its servicing obligations, MBNA agrees to carry out

warranty work on vehicles and parts supplied by Daimler-Benz in accordance with Daimler-Benz's directives. MBNA must perform warranty work on vehicles irrespective of where they were sold, including foreign versions of Daimler-Benz's vehicles, and must process warranty claims according to the instructions set out in Daimler-Benz's manual for warranty procedure. All workshops used to provide service to customer vehicles must meet Daimler-Benz's standards regarding size, personnel, equipment, and organization. MBNA is to impose the same obligations accepted by it under the agreement on all authorized workshops, service stations, and other workshops with which it enters dealer agreements. Finally, MBNA must observe Daimler-Benz's directives in carrying out its advertising and canvassing activities.

The agreement expressly provides that it is in the common interest of Daimler-Benz and MBNA to establish a corporate identity for the dealer network worldwide. To further this corporate identity, MBNA must observe Daimler-Benz's directives in designing its interior and exterior premises, its outdoor advertising, and its stationery. In pursuing its activities under the agreement, MBNA has the duty to use Daimler-Benz's names, trademarks, and service marks, subject to Daimler-Benz's approval of the manner of this use. The agreement also requires MBNA to develop its market territory systematically and obligates MBNA to spare no effort to sell Daimler-Benz's vehicles and "to represent directly and indirectly the interests of" Daimler-Benz. The agreement disclaims an agency relationship between Daimler-Benz and MBNA, stating that the relationship between the parties is that of vendor-vendee and that MBNA has no right to bind Daimler-Benz in any manner without Daimler-Benz's written consent.

The terms of the agreement we have set forth directly align MBNA's interests with Daimler-Benz's interest in maximizing the sales of its vehicles in the U.S. The agreement specifically authorizes MBNA to represent, "directly and indirectly,"

Daimler-Benz's interests in the United States and requires MBNA to further those interests. As detailed above, the agreement gives Daimler-Benz extensive control over the details of MBNA's management and operations.

In contrast to the distribution agreement, the parties stipulated that MBNA is a separately operated subsidiary of Daimler-Benz. Daimler-Benz also submitted evidence that Daimler-Benz has never participated in the day-to-day conduct of MBNA's business and that, once it has sold cars and parts to MBNA in Germany, Daimler-Benz exercises no control over MBNA in its subsequent sales. Granting that this evidence conflicts with the distribution agreement, we will consider the distribution agreement not as conclusive evidence, but as some evidence to be weighed with other evidence in the record. Nevertheless, considering the distribution agreement with the evidence of Daimler-Benz's corporate structure, we believe that it is proper to view Daimler-Benz as doing business in Texas through the activities of MBNA.

4. Internet Web Site with E-mail

The parties stipulated that Daimler-Benz maintains an Internet web site by means of which individuals around the world, including those in Texas, can communicate with it electronically. The web site offers Internet users information about Daimler-Benz and its worldwide products and services. On one subdirectory entitled "Mailing Service," Texas residents can register with Daimler-Benz to receive direct mailings from Daimler-Benz electronically. Another subdirectory allows Texas residents to communicate with and request replies from Daimler-Benz representatives. Daimler-Benz does not offer Mercedes-Benz vehicles for sale to Texas residents over the Internet, but refers sales inquiries from the U.S. to MBNA. MBNA maintains an independent web site on which it advertises U.S.-version Mercedes-Benz vehicles available for sale at authorized dealers throughout the U.S., including Texas.

In Texas, the continuum of Internet activities is divided into three categories for purposes of personal jurisdiction. At one end of the scale, defendants who make contracts with residents of other jurisdictions that involve the knowing and repeated transmission of computer files electronically do business over the Internet. *Jones*, 995 S.W.2d at 772. At the other end of the scale, defendants who establish passive web sites that do no more than make information available to Internet users do not provide grounds for personal jurisdiction. *Id.* In between lie interactive web sites, which allow users to exchange information with a host computer, communicating with the person or company that runs the web site. In these cases, the exercise of jurisdiction depends on the level of interactivity between the parties on the web site. *Id.*

The web site Daimler-Benz maintains is interactive, allowing Texas residents to submit comments and questions to Daimler-Benz representatives and to receive electronic mailings from Daimler-Benz. Daimler-Benz, however, makes no sales or other contracts through its Internet web site. While this level of interactivity standing alone might not be enough to subject Daimler-Benz to jurisdiction in Texas, we will consider it a factor, along with the other contacts that exist in this case.[6]

The evidence as a whole shows that Daimler-Benz advertises its cars in Texas, that MBNA functions essentially as

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[6] Although the parties' stipulations as to Daimler-Benz's web site are stated in the present tense and appear to have been made in 1998, other evidence shows that the web site existed in 1996. In its 1995 annual report, Daimler-Benz stated that it had improved its customer interaction system for use on the World Wide Web; Daimler-Benz's customer interaction system allowed customers to choose a model, color, and options to compose their ideal car on a personal computer screen. The advanced features available on Daimler-Benz's web site in 1998, such as live coverage of the shareholders' meeting, a history game visitors could play for prizes, a guest book, and an order service, make it reasonable to infer that the interactive features described in the parties' stipulations existed in 1996.

an exclusive sales conduit for Daimler-Benz, and that Daimler-Benz solicits communication from Texas residents through its web site. It is conclusively established that Daimler-Benz has business operations and relationships in Texas and that it competes in the Texas marketplace. Implied findings in these respects support the legal conclusion that Daimler-Benz has engaged in systematic and continuous contacts with Texas. Because we have determined that Daimler-Benz is subject to general jurisdiction, we need not consider whether specific jurisdiction exists.

Fair Play and Substantial Justice

Finally, Daimler-Benz argues that, under the second prong of the due process test, the exercise of jurisdiction by a Texas court fails to comport with traditional notions of fair play and substantial justice. *Guardian Royal*, 815 S.W.2d at 228. In deciding this issue, we consider the following factors: (1) the burden on the defendant, (2) the interests of the forum state in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. When the defendant is a resident of another nation, the court must also consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by a state court as well as the federal government's interest in its foreign relations policies. *Id.* at 229.

In this case, Daimler-Benz's significant business contacts with Texas lessen the burden on it to defend the suit in Texas. Daimler-Benz itself has already initiated litigation in a Texas court, showing that it is capable of pursuing its legal interests in Texas and is not unfamiliar with Texas jurisprudence. Texas's interest in protecting its citizens from defective cars that cause injury and death within its territory is strong. The Olsons have

also sued the company owning the van that collided with Karen, and Texas undisputedly has jurisdiction over this company. The most convenient and efficient way to resolve the entire controversy is to allow the Olsons to proceed against Daimler-Benz in the same suit in Texas. Thus, the Olsons' interest in obtaining convenient and efficient relief also weighs in favor of jurisdiction in Texas.

The evidence shows that Daimler-Benz places a large volume of vehicles into a stream of commerce destined for the United States and that Daimler-Benz's stock is traded on the New York Stock Exchange. The federal government's foreign policy interests are not hindered when individual states ensure that large international companies operate in an equitable business environment in which wrongs are redressed by those responsible. The parties also stipulated that Daimler-Benz maintains general liability insurance, including products liability insurance, covering claims made against it worldwide. Such protection being consonant with business policies in Germany, to allow recovery on such insurance following a judicial determination of liability would not appear to violate Germany's policies. We conclude that the assertion of personal jurisdiction by the district court comports with traditional notions of fair play and substantial justice.

CONCLUSION

Having determined that Daimler-Benz has established minimum contacts with Texas and that the assertion of jurisdiction comports with fair play and substantial justice, we overrule Daimler-Benz's two issues. We affirm the order of the district court.

Bea Ann Smith, Justice

Before Justices Jones, Kidd and B.A. Smith

Affirmed

Filed: June 15, 2000

Publish

APPENDIX B

Texas Court of Appeals, Third District, at Austin

JUDGMENT RENDERED JUNE 15, 2000

No. 03-99-00114-CV

Daimler-Benz Aktiengesellschaft, Appellant

v.

Scott Olson, Individually and as Independent Executor of the Estate of Karen L. Olson, and Vickie Olson, Appellees

APPEAL FROM THE DISTRICT COURT OF BELL COUNTY, BEFORE JUSTICES JONES, KIDD AND B.A. SMITH, AFFIRMED ON MOTION FOR REHEARING – OPINION BY JUSTICE B.A. SMITH

THIS CAUSE came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's order: IT IS THEREFORE considered, adjudged and ordered that this Court's prior opinion and judgment issued March 23, 2000 are withdrawn and that the order of the trial court is in all things affirmed. It is FURTHER ordered that the appellant, Daimler-Benz Aktiengesellschaft, pay all costs relating to this appeal, both in this Court and the court below; and that this decision be certified below for observance.

APPENDIX C

[seal omitted] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

April 05, 2001

Mr. Michael L. Scanes
Naman Howell Smith & Lee
P.O. Box 1470
Waco, TX 76703-1470

Mr. Joe R. Greenhill
Baker & Botts
98 San Jacinto Blvd., Suite 1600
Austin, TX 78701-4039

Mr. Tommy Jacks
Mithoff & Jacks
111 Congress Avenue, Suite 1010
Austin, TX 78701

Mr. Richard P. Hogan
Hogan Dubose & Townsend
440 Louisiana, Suite 1400
Houston, TX 77002

Mr. William Powers, Jr.
The University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705

Mr. William T. Wilson
Law Offices of William T. Wilson
P.P. Box 427
Temple, TX 76503-0427

RE: Case Number 00-0791
Court of Appeals Number: 03-99-00114-CV
Trial Court Number: 158,786C

Style: IN RE: DAIMLER-BENZ AKTIENGESELLSCHAFT

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for writ of mandamus in the above-referenced case.

Sincerely,

John T. Adams, Clerk

by /s/
Blanca E. Morin, Deputy

cc: Ms. Diane O'Neal, Clerk
Ms. Sheila Norman, Clerk
The Hon. Rick Morris, Judge
Mr. Alan E. Untereiner

APPENDIX D

[seal omitted] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

April 05, 2001

Mr. Michael L. Scanes
Naman Howell Smith & Lee
P.O. Box 1470
Waco, TX 76703-1470

Mr. Joe R. Greenhill
Baker & Botts
98 San Jacinto Blvd., Suite 1600
Austin, TX 78701-4039

Mr. Richard P. Hogan, Jr.
Hogan Dubose & Townsend
700 Louisiana, Suite 4200
Houston, TX 77002

Mr. Russell S. Post
Hogan Dubose & Townsend
700 Louisiana, Suite 4200
Houston, TX 77002

Mr. William Powers, Jr.
The University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705

RE: Case Number 00-0792
Court of Appeals Number: 03-99-00114-CV
Trial Court Number: 158,786C

Style: DAIMLER-BENZ AKTIENGESELLSCHAFT
v.
SCOTT OLSON, individually, and as an independent executory of the ESTATE OF KAREN L. OLSON and VICKIE OLSON

Dear Counsel:

Today, the Supreme Court of Texas dismissed for want of jurisdiction the petition for review, as redrafted, in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/
Blanca E. Morin, Deputy

cc: Ms. Diane O'Neal, Clerk
Ms. Sheila Norman, Clerk

APPENDIX E

[Filed-stamp
omitted]

NO. 158,786C

IN THE DISTRICT COURT
OF BELL COUNTY, TEXAS
169TH JUDICIAL DISTRICT

SCOTT OLSON, INDIVIDUALLY, AND AS
INDEPENDENT EXECUTOR OF THE ESTATE
OF KAREN L. OLSON, AND VICKIE OLSON

VS.

DAIMLER-BENZ AKTIENGESELLSCHAFT
AND CENTRAL PRODUCT COMPANY
OF TEMPLE, TEXAS

ORDER

Came on for hearing Defendant DAIMLER-BENZ AKTIENGESELLSCHAFT's Special Appearance to Present Motion Objecting to The Jurisdiction and the Court having heard the evidence and arguments of counsel is of the opinion that Motion is without merit and should be therefore DENIED.

It is therefore ORDERED, ADJUDGED and DECREED that Defendant DAIMLER-BENZ AKTIENGESELLSCHAFT's Special Appearance to Present Motion Objecting to The Jurisdiction is OVERRULED and DENIED.

SIGNED this 16th day of February 1999.

/s/ Rick Morris
JUDGE PRESIDING

APPENDIX F

[seal omitted] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

September 20, 2001

Mr. Michael L. Scanes
Naman Howell Smith & Lee
P.O. Box 1470
Waco, TX 76703-1470

Mr. Joe R. Greenhill
Baker & Botts
98 San Jacinto Blvd., Suite 1600
Austin, TX 78701-4039

Mr. Tommy Jacks
Mithoff & Jacks
111 Congress Avenue, Suite 1010
Austin, TX 78701

Mr. Richard P. Hogan
Hogan Dubose & Townsend
440 Louisiana, Suite 1400
Houston, TX 77002

Mr. William Powers, Jr.
The University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705

Mr. William T. Wilson
Law Offices of William T. Wilson
P.P. Box 427
Temple, TX 76503-0427

RE: Case Number 00-0791
Court of Appeals Number. 03-99-00114-CV
Trial Court Number: 158,786C

Style: IN RE: DAIMLER-BENZ AKTIENGESELLSCHAFT

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing in the above styled petition for writ of mandamus. Justice Rodriguez not sitting.

Sincerely,

John T. Adams, Clerk

by /s/
Gena Pelham, Deputy Clerk

cc: Ms. Diane O'Neal, Clerk
Ms. Sheila Norman, Clerk
The Hon. Rick Morris, Judge
Mr. Alan E. Untereiner

APPENDIX G

[seal omitted] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

September 20, 2001

Mr. Michael L. Scanes
Naman Howell Smith & Lee
P.O. Box 1470
Waco, TX 76703-1470

Mr. Joe R. Greenhill
Baker & Botts
98 San Jacinto Blvd., Suite 1600
Austin, TX 78701-4039

Mr. Richard P. Hogan, Jr.
Hogan Dubose & Townsend
700 Louisiana, Suite 4200
Houston, TX 77002

Mr. Russell S. Post
Hogan Dubose & Townsend
700 Louisiana, Suite 4200
Houston, TX 77002

Mr. William Powers, Jr.
The University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705

RE: Case Number 00-0792
Court of Appeals Number: 03-99-00114-CV
Trial Court Number: 158,786C

Style: DAIMLER-BENZ AKTIENGESELLSCHAFT
v.
SCOTT OLSON, individually, and as an independent executory of the ESTATE OF KAREN L. OLSON and VICKIE OLSON

Dear Counsel:

Today, the Supreme Court of Texas, Justice Rodriguez not sitting, denied the motion for rehearing of the above styled petition for review.

Sincerely,

John T. Adams, Clerk

by /s/
Tanya R. Hunter, Deputy Clerk

cc: Ms. Diane O'Neal, Clerk
Ms. Sheila Norman, Clerk

APPENDIX H

Tex. Civ. Prac. & Rem. Code 17.042:

Acts Constituting Business in This State

In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident:

(1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state;

(2) commits a tort in whole or in part in this state; or

(3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.

APPENDIX I

[Filed-stamp omitted]

NO. 158,786C

SCOTT OLSON, INDIVIDUALLY, AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF KAREN L. OLSON, AND VICKIE OLSON	§	IN THE DISTRICT COURT
V.	§	169TH JUDICIAL DISTRICT
DAIMLER-BENZ AKTIENGESELLSCHAFT; AND CENTRAL PRODUCE COMPANY OF TEMPLE, TEXAS	§	BELL COUNTY, TEXAS

DEFENDANT, DAIMLER-BENZ AKTIENGESELLSCHAFT'S SPECIAL APPEARANCE TO PRESENT MOTION OBJECTING TO THE JURISDICTION AND ORIGINAL ANSWER SUBJECT TO SAID SPECIAL APPEARANCE

TO THE HONORABLE JUDGE OF THIS COURT:

DAIMLER-BENZ AKTIENGESELLSCHAFT, one of the defendants in the above-styled and numbered cause, makes this special appearance pursuant to Texas Rule of Civil Procedure 120a for the purpose of objecting to the jurisdiction of the Court over said defendant, and as grounds therefore shows the following:

I.

This special appearance is made to the entire proceeding asserted by the plaintiff seeking a judgment based upon causes of action for damages for personal injuries.

II.

This special appearance is filed prior to a motion to transfer or any other plea, pleading or motion.

III.

This Court does not have jurisdiction over the defendant, Daimler-Benz Aktiengesellschaft, Ltd., or any of this defendant's property for the reason that neither such party nor its property is amenable to process issued by the courts of the State of Texas. In this connection, this defendant would further show that:

A. This defendant is not a resident of Texas, and neither is required to maintain nor maintains a registered agent for service in Texas.

B. Defendant is not now engaged and has not engaged in business in Texas.

C. Defendant does not maintain a place of business in Texas, and has no employees, servants or agents within the state.

D. Defendant has not, and does not, own or lease any real or personal property in Texas.

E. Defendant does not have a mailing address or telephone listing in Texas and neither has nor

maintains any bank accounts or business records in Texas.

F. Defendant has not conducted any advertising, solicitation, service or sales activities in Texas.

G. Defendant lacks the "minimum contacts" with Texas necessary for a Texas court to assume jurisdiction over the defendant or its property.

H. Exercise of extraterritorial jurisdiction denies this non-resident defendant due process of law, in that it would offend traditional notions of fair play and substantial justice.

IV.

The assumption of jurisdiction by the Court over this defendant or its property would deprive said defendant of its due process rights guaranteed by the Constitutions of the United States and Texas.

WHEREFORE, defendant, Daimler-Benz Aktiengesellschaft, requests that this motion be set for hearing on notice to plaintiffs and, upon such hearing, this motion be in all things sustained and the entire proceeding as to Daimler-Benz Aktiengesellschaft be dismissed for want of jurisdiction.

Respectfully submitted,

/s/

David M. Prichard
State Bar No. 16317900
Direct Telephone No. (210) 731-6310

Grant T. McFarland
State Bar No. 13598200
Direct Telephone No. (210) 731-7354

BALL & WEED
A Professional Corporation
Trinity Plaza II, Suite 500
745 East Mulberry
San Antonio, Texas 78212
Telephone: (210) 731-6300
Telefax: (210) 731-6499

ATTORNEYS FOR DEFENDANT, DAIMLER-BENZ AKTIEN-GESELLSCHAFT

* * * *

DEFENDANT'S ORIGINAL ANSWER SUBJECT TO DEFENDANT'S SPECIAL APPEARANCE

TO THE HONORABLE JUDGE OF THE COURT:

Subject to its special appearance, Daimler-Benz Aktiengesellschaft, one of the defendants in the above-entitled and numbered cause files this its original answer to plaintiffs' original petition, and for such answer would respectfully show unto this Honorable Court the following:

I.

This defendant generally denies each and every allegation contained in plaintiffs' original petition and, upon this denial, demands a trial of the issues before a jury.

II.

Further answering, this defendant denies that he plaintiffs suffered any damages or injuries as a result of any acts or omission of this defendant but, on the contrary, states that immediately prior to and at the time of the accident in question, persons not within this defendant's control committed negligent acts and omissions which were the proximate and sole cause of the accident and injuries and damages, if any, resulting therefrom.

WHEREFORE, PREMISES CONSIDERED, defendant, Daimler-Benz Aktiengesellschaft, prays that plaintiffs take nothing as against this defendant by their suit, that this defendant recover all costs incurred herein, and for such other general relief to which it is justly entitled.

Respectfully submitted,

* * * *

APPENDIX J

CAUSE NO. 158,786C

SCOTT OLSON, INDIVIDUALLY, and AS INDEPENDENT EXECUTOR OF THE ESTATE OF KAREN L. OLSON, and VICKIE OLSON	IN THE DISTRICT COURT OF
V.	BELL COUNTY, TEXAS
DAIMLER-BENZ AKTIENGESELLSCHAFT; AND CENTRAL PRODUCE COMPANY OF TEMPLE, TEXAS	169TH JUDICIAL DISTRICT

STATE OF NEW JERSEY)
) SS:
COUNTY OF BERGEN)

WAYNE H. SAMSON, being first duly sworn, deposes and says:

I am over the age of eighteen years and am otherwise competent to make this affidavit. I have personal knowledge of all the facts stated below and those facts are true and correct.

1. I am the Vice President, General Counsel and Secretary of Mercedes-Benz of North America, Inc. My office address is One Mercedes Drive, Montvale, New Jersey 07645.

2. Mercedes-Benz of North America, Inc. ("MBNA") is a corporation organized under the laws of the State of Delaware with its principle place of business located at One Mercedes Drive, Montvale, New Jersey 07645.

3. MBNA is the sole distributor of Mercedes-Benz automobiles in the United States and an importer and distributor of Mercedes-Benz automobile parts in the United States.

4. I am not an officer, employee or agent of Daimler-Benz Aktiengesellschaft ("DBAG") or Mercedes-Benz Aktiengesellschaft ("MBAG"). However, I am familiar with the status and affairs of said companies as more fully appears in the remaining paragraphs of this Affidavit. MBNA is a wholly-owned subsidiary of DBAG. By virtue of my position with MBNA, I have obtained personal knowledge of the structure, status and affairs of MBNA's parent and sister corporations.

5. DBAG is a German corporation with princip[al] offices located in the City of Stuttgart, Germany. DBAG, is a publicly owned holding company having share holdings in various companies, one of which is MBAG, a wholly owned subsidiary.

6. Prior to July 1, 1989, DBAG, as part of its business operation, manufactured and distributed Mercedes-Benz vehicles and parts. On July 1, 1989, DBAG transferred all of its motor vehicle business, including the manufacture and distribution of Mercedes-Benz vehicles and parts, to MBAG. Such transfer encompassed all contractual rights and obligations relating to the automotive business, including distribution agreements.

7. Neither DBAG nor MBAG do business in the State of Texas and neither maintains an office, agency or representative there. No one is authorized by DBAG or MBAG to accept service of process in Texas. DBAG and MBAG have

not now and never been engaged in business in Texas. Said corporations are not now and never have been qualified, licensed or authorized to do business in Texas. Said corporations do not now have and never have had any officers, employees, or agents located in Texas. Said corporations have not and do not now own, maintain, control, lease or possess any offices, plants, warehouse, equipment, inventory, books and records, mailing address, telephone listing, bank accounts, or other real or personal property in Texas. Said corporations have never appointed any agent for service of process in Texas. Neither company conducts advertising nor solicitation activities in Texas or conducts any sales, service or other business activities in Texas. The foregoing is true at the present time and at all times material to this case, i.e., 1979 to the present.

8. DBAG and MBAG have never made any sales of Mercedes-Benz automobiles in the United States to any buyer, and all sales of parts for said vehicles are made in Germany and never in the United States. Passenger cars intended for sale within the United States, its territories and possessions, excluding the Panama Canal Zone, are sold in Germany to MBNA, a wholly owned subsidiary of Daimler-Benz North America Corporation which, in turn, is a wholly owned subsidiary of DBAG. MBNA also purchase certain automobile parts from MBAG in Germany. MBNA then ships any cars and/or parts purchased to the United States.

9. In 1980, MBNA had a distribution agreement with DBAG pursuant to which MBNA was granted exclusive importation and distribution rights for Mercedes-Benz passenger cars and parts within the United States, its territories and possession, excluding the Panama Canal Zone. In addition, MBNA and DBAG executed a license agreement pursuant to which MBNA was granted non-exclusive rights to use certain trademarks, trade name and service marks owned by DBAG. Prior to July 1, 1989, and since that time, cars and parts intended for sale in the United States were sold to MBNA in

Germany. MBNA shipped the cars and/or parts to the United States.

10. MBNA, DBAG and MBAG have now, and had in 1980, separate corporate existences and each had and has its own officers and directors. The distinct and separate existences of these corporations have always been formally maintained, exercised and observed in all respects. MBNA, not DBAG or MBAG, handled and handles all the detailed accounting and record keeping associated with the distribution of Mercedes-Benz vehicles and automobile parts within the United States. In particular, MBNA, not DBAG or MBAG, handled and handles as well the detailed accounting and record keeping associated with dealers.

11. Pursuant to the specific provisions of its distribution agreement with DBAG, prior to July 1, 1989, and with MBAG since then, MBNA had and has the right to appoint, supervise and terminate its Mercedes-Benz franchise dealers without the consent or approval of DBAG or MBAG. The foregoing is true at the present time and was true at all times material to this case, i.e., 1979 to the present. MBNA was and is merely required, pursuant to the distribution agreement, to advise MBAG (and DBAG prior to July 1, 1989) of the same names and addresses of all authorized dealers and any changes thereof. DBAG, prior to July 1, 1989, and MBAG since that time, have not participated in the selection by MBNA of dealers nor in the enforcement of any contractual obligations between MBNA and the dealers. MBAG and DBAG have never participated in the day-to-day conduct of MBNA's business. Neither MBAG nor DBAG has ever been a party to any contract between MBNA and its dealers. All of the books, records, tax returns and financial statements of MBNA have always been kept separate from the books, records, tax returns and financial statements of MBAG and DBAG. All real estate, offices, plants warehouses or other real property used or controlled by MBNA have been owned by it or leased by it from third parties other than MBAG

or DBAG. All equipment, inventory, books and records, bank accounts and other personal property used or controlled by MBNA are and have been owned by it or leased by it from third parties other than MBAG or DBAG.

12. MBNA has always selected Mercedes-Benz vehicle models that it distributes in the United States. Currently, of the approximately fifty Mercedes-Benz models which MBAG manufactures, MBNA imports and distributes eighteen Mercedes-Benz models into the United States. In 1980, DBAG manufactured approximately fifty-nine Mercedes-Benz models, of which MBNA imported and distributed only eleven models into the United States. At all times material to this case, i.e., from 1979 to the present, MBNA has established the prices for all products which it distributes under the auspices of the distribution agreement.

13. Prior to July 1, 1989, all sales of Mercedes-Benz automobiles or parts were made by DBAG to MBNA in Germany. Once the automobiles or parts were sold or delivered to MBNA in Germany, DBAG exercised no control over the automobiles or parts. DBAG exercised no control over any retail dealers in the United States who may thereafter sell the automobiles or parts. Since July 1, 1989 DBAG has not exercised any control over MBNA, automobiles or parts purchased by MBNA from MBAG in Germany or any retail dealers in the United States who may thereafter sell the automobiles or parts. Since July 1, 1989, all sales of Mercedes-Benz automobiles or parts have been made by MBAG to MBNA in Germany. Once the automobiles or parts are sold and delivered to MBNA in Germany, MBAG exercises no control over MBNA in its subsequent sales of the automobiles or parts, and MBAG exercises no control over any retail dealers in the United States who may thereafter sell the automobiles or parts.

14. According to the police report made of the accident underlying this lawsuit, Karen L. Olsen was driving a 1980

brown Mercedes model 500-SE with chassis identification number WDB 126 036 12 002 267. According to the records still available, the vehicle with this chassis number was a model 500-SE car. MBNA did not import into the United States any 1980 model 500-SE cars. Thus, this vehicle was not manufactured for sale in the United States, but was instead manufactured for sale outside of the United States.

I hereby certify that the statements made by me are true. I am fully aware that if any of the foregoing statements by me are willfully false, I am subject to penalty.

Dated: September 24, 1996

/s/
WAYNE H. SAMSON

Subscribed and sworn to before me
this 24th day of September, 1996

/s/
Notary Public

Antoinette M. Stalter
Notary Public of New Jersey
My Commission Expires Sept. 10, 1997

APPENDIX K

NO. 158,786C

SCOTT OLSON, INDIVIDUALLY, AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF KAREN L. OLSON, AND VICKIE OLSON	§	IN THE DISTRICT COURT
	§	169TH JUDICIAL DISTRICT
V.	§	
DAIMLER-BENZ AKTIENGESELLSCHAFT; AND CENTRAL PRODUCE COMPANY OF TEMPLE, TEXAS	§	BELL COUNTY, TEXAS

AGREED STIPULATION

TO THE HONORABLE JUDGE OF THE COURT:

Plaintiffs Scott Olson, individually and as independent executor of the Estate of Karen L. Olson, and Vickie Olson and Defendant Daimler-Benz Aktiengesellschaft (hereafter "DBAG") stipulate as stated below. Defendant DBAG enter into this stipulation to its previously-filed special appearance and without waiving same.

Plaintiffs Scott Olson, individually and as independent executor of the Estate of Karen L. Olson, and Vickie Olson and Defendant DBAG stipulate to the following:

1. On or about April 3, 1995, Karen L. Olson, deceased, was involved in a motor vehicle collision

while driving a non-U.S.-version model year 1980 Mercedes-Benz 500SE automobile, VIN: 126036-12-002267 (hereinafter "Subject Vehicle").

2. The Mercedes-Benz model 500SE vehicle was designed and manufactured by Daimler-Benz Aktiengesellschaft (hereinafter "DBAG") in Germany for the European marketplace. The Mercedes-Benz 500SE was not designed for the U.S., was not sold to a DBAG subsidiary for export to the U.S. and was not marketed in or placed by DBAG in a stream of commerce destined for the United States. However, DBAG does design, manufacture, and sell vehicles in a stream of commerce intended for the U.S. market, including the State of Texas. The Subject Vehicle was first sold to a customer in Stuttgart, Germany. Neither DBAG nor any of its subsidiaries or affiliates played any role in, or have any knowledge regarding the specifics of, the importation of the Subject Vehicle to the U.S.

3. The motor vehicle collision in which Karen L. Olson, deceased, was involved occurred in Bell County, Texas, at or near the intersection of South 57th Street and Scott Boulevard in Temple, Texas.

4. The Subject Vehicle being driven by Karen L. Olson, deceased, on or about April 3, 1995, was struck on its left side by a 1993 Ford Econoline 350 van being driven by Justin M. Wright.

5. In this lawsuit, Plaintiffs allege, among other things, that the Subject Vehicle being driven by Karen L. Olson, deceased, was defectively designed and/or manufactured, and that these defects were a producing cause of the death of Karen L. Olson,

and the damages for which Plaintiffs seek compensation.

6. The plaintiffs are Texas residents.

7. DBAG is a German corporation organized and existing under the laws of the Federal Republic of Germany with its principal place of business in the city of Stuttgart, Germany.

8. Prior to July 1, 1989, DBAG, as part of its business operations, designed, manufactured and wholesaled Mercedes-Benz vehicles and parts.

9. On July 1, 1989, DBAG, as part of a business reorganization transferred all of its motor vehicle business, including design, manufacture and distribution of Mercedes-Benz vehicles and parts, to Mercedes-Benz Aktiengesellschaft ("MBAG"). Such transfer encompassed all contractual rights and obligations relating to the automotive business, including distribution agreements. MBAG was, from approximately July, 1989, to May, 1997, a German corporation organized and existing under the laws of the Federal Republic of Germany with its principal place of business in the city of Stuttgart, Germany. During its existence, MBAG was a wholly owned but separately operated subsidiary of DBAG.

10. As a result of further business reorganization, effective as of May, 1997, MBAG's rights and obligations were transferred back to DBAG. MBAG then ceased to exist.

11. Mercedes-Benz of North America, Inc. ("MBNA"), is a Delaware corporation with its principal place of

business in Montvale, New Jersey. MBNA is a wholly owned but separately operated subsidiary of Daimler-Benz of North America Corporation ("DBNAC"), a Delaware corporation with its principal place of business in New York City, New York. DBNAC is a wholly owned but separately operated subsidiary of DBAG. MBNA is the sole North American distributor of Mercedes-Benz automobiles, and it is the exclusive importer and distributor in North America of Mercedes-Benz automobile parts.

12. MBNA purchases in Germany U.S.-version Mercedes-Benz vehicles from DBAG and formerly from MBAG. MBNA then ships those vehicles to United States ports of entry and thence to various Vehicle Preparation Centers in the United States which are owned or leased and operated by MBNA. Similarly, MBNA ships parts it has purchased from DBAG and formerly MBAG in Germany to the United States through U.S. ports of entry and thence to Parts Distribution Centers in the United States which are owned or leased and operated by MBNA.

13. Prior to 1995, Mercedes-Benz automobiles were shipped by MBNA from Germany to the Houston Port Authority in Texas. From that point, the automobiles were then transported by land from the Houston, Texas, port of entry to a Vehicle Preparation Center in or near Houston, Texas.

14. DBAG and/or formerly MBAG are and/or were parties to a Distribution Agreement with MBNA pursuant to which MBNA is granted exclusive importation and distribution rights for U.S. version Mercedes-Benz passenger cars and parts for the

United States, its territories and possessions, excluding the Panama Canal Zone and provides for a license to permit the use of certain DBAG trademarks by MBNA. Attached to these stipulations is a true copy of the Distribution Agreement (without exhibits) in effect at the time of the accident involving Karen L. Olson.

15. DBAG designed and manufactured certain Mercedes-Benz vehicles according to US specification and for certification for sale to MBNA. Through this procedure, DBAG and formerly MBAG had authorized MBNA to market certain US-version vehicles in the US marketplace including the State of Texas.

16. DBAG and formerly MBAG designs and manufactures US-version Mercedes-Benz vehicles to comply with applicable federal and state regulations so they can be certified as compliant and sold to MBNA in Germany for marketing and distribution by MBNA in the United States, including the State of Texas. Vehicles not intended for sale to MBNA, such as the subject vehicle, are not necessarily so designed, manufactured and certified.

17. Neither DBAG nor MBAG has ever advertised the sale of Mercedes-Benz vehicles in the United States or in the State of Texas. MBNA and its local authorized dealers advertise US-version Mercedes-Benz vehicles for sale in the United States including the State of Texas, including advertising in publications and newspapers directed to Texas and over television and radio stations throughout Texas. MBNA has never advertised the sale of

non-US Mercedes-Benz vehicles in the United States.

18. DBAG has a web site on the Internet through which individuals throughout the world, including individuals in the State of Texas, may communicate with it via electronic comminations. DBAG's web site contains information with regard to DBAG and its worldwide products and services which may be viewed by individuals choosing to enter its web site. DBAG does not by the availability of its web site to individuals worldwide offer any Mercedes-Benz vehicles for sale vehicles to individuals in the State of Texas or in the United States. MBNA maintains a separate web site which is not shared with DBAG's web site in which it advertises for sale and promotes the sale of US-version Mercedes-Benz vehicles through authorized dealers located throughout the United States including the State of Texas.

19. On the DBAG Internet site at <www.daimler-benz.com/aktie/kontakt/noemail_e.htm>, titled "Mailing Service," Texas residents can register with DBAG to receive direct mailings from DBAG via electronic mail.

20. DBAG maintains an Internet site at <www.daimler-benz.com/service/dialog/dialog_e.htm>, through which Texas residents can communicate with, and request a reply from DBAG representatives. Inquiries from the United States to DBAG with respect to the sale of Mercedes-Benz vehicles are referred by DBAG to MBNA.

21. DBAG employees have on sporadic occasions traveled to Texas on personal matters as well as on

business matters including, on occasion, some employees accompanying representatives of MBNA on vehicle inspections at the request of MBNA or in conjunction with litigation. A DBAG employee on a temporary visit to MBNA offices in New Jersey accompanied MBNA's accident investigators when they inspected the Subject Vehicle after the Subject Accident.

22. On occasion MBNA arranges for its authorized US dealers to visit DBAG's (formerly MBAG's) facilities in Germany to observe the production process and to see new model vehicles which will be introduced into the US marketplace. This is done solely by MBNA upon the consent of DBAG, and formerly MBAG.

23. DBAG (and formerly MBAG) maintains and/or maintained general liability insurance, including products liability insurance covering claims made against it on a worldwide basis including the State of Texas.

24. On October 5, 1993, DBAG stock became listed on the New York Stock Exchange. As a result, DBAG became the second German company to be so listed, the first such Germany company being Veba AG.

25. MBNA is qualified to do business in the State of Texas.

26. Principal subsidiary and affiliated companies of DBNAC, in addition to MBNA, include Freightliner Corporation of Portland, Oregon; Siliconix, Inc. of Santa Clara, California; and Mercedes-Benz Credit Corporation of Norwalk,

Connecticut. AEG/ElectroCom International, Inc. of Irving, Texas was a wholly owned subsidiary of DBNAC which no longer exists but which existed at the time of the occurrence made the basis of this case. None of these entities have anything to do with the design, manufacture, distribution or importation of the Subject Vehicle.

28. This stipulation is not meant to supersede the declaration of Wayne Samson of September 24, 1996, filed previously in this case, but only to supplement it.

Respectfully submitted,

/s/

MARK G. EINFALT
State Bar No. 06502452

MITHOFF & JACKS
1010 Franklin Plaza
111 Congress Avenue
Austin, Texas 78701
(512) 478-4422
Telecopier No.: (512) 478-5015

ATTORNEYS FOR PLAINTIFFS

AND

/s/

DAVID M. PRICHARD
State Bar No. 16317900
Direct Line: (210) 731-6310

BALL & WEED, P.C.
A Professional Corporation
Trinity Plaza II, Suite 500
745 East Mulberry
San Antonio, Texas 78212
(210) 731-6300
Telecopier No. (210) 731-6499

ATTORNEYS FOR DEFENDANT DBAG

* * * *

APPENDIX L

[Filed-stamp omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAIMLER-BENZ AKTIENGESELLSCHAFT and MERCEDES-BENZ OF NORTH AMERICA, INC.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 3-98CV1308H
RAY MOGHIMI, d/b/a PARK PLACE AUTO GROUP,	§	
Defendant.	§	

PLAINTIFFS' ORIGINAL COMPLAINT

Plaintiffs, Daimler-Benz Aktiengesecllschaft and Mercedes-Benz of North America, Inc., complaining of Defendant, Ray Moghimi, d/b/a Park Place Auto Group, allege for their Original Complaint as follows:

I. PARTIES

1. Plaintiff Daimler-Benz Aktiengesellschaft ("Daimler-Benz") is a corporation organized and existing under the laws of the Federal Republic of Germany with its principal place of business in Stuttgart, Federal Republic of Germany.

2. Plaintiff Mercedes-Benz of North America, Inc. ("Mercedes-Benz") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Montvale, New Jersey. Mercedes-Benz is the exclusive distributor of Mercedes-Benz automobiles in the United States and is an indirect wholly owned subsidiary of Daimler-Benz and its licensee in the United States with respect to the trademarks, service marks and trade name referred to below.

3. Defendant, Ray Moghimi, d/b/a Park Place Auto Group, is an individual who, upon information and belief, resides in Dallas County, Texas, and does business under the name of Park Place Auto Group at 13408 Floyd Circle, Dallas, Texas 75243. Defendant may be served with citation and a copy of this Original Complaint at his business address: Park Place Auto Group, 13408 Floyd Circle, Dallas, Texas 75243, or at his residence address: 6011 Arboleda Way, Dallas, Texas 75248-5801.

II. JURISDICTION

4. Jurisdiction in this District Court is based upon Plaintiffs' claims arising under the Lanham Act, 15 U.S.C. Section 1121(a), and on diversity of citizenship. Jurisdiction is conferred upon this District Court pursuant to 28 U.S.C. Sections 1331, 1332 and 1338. This District Court also has supplemental jurisdiction over Plaintiffs' claims under Texas state law pursuant to 28 U.S.C. Section 1367(a).

III. VENUE

5. Venue is proper in this judicial district under 28 U.S.C. Sections 1391(b), and 28 U.S.C. Section 1400(a), in that Defendant is doing business and may be found in this judicial district for purposes of venue, and Defendant's infringements have and will have effect in this judicial district.

IV. CLAIMS FOR RELIEF

COUNT ONE

INFRINGEMENT OF FEDERALLY REGISTERED TRADEMARKS AND SERVICE MARKS

6. This cause of action for infringement of federally registered trademarks and service marks arises under the Trademark Act of 1946, 15 U.S.C. § 1051 et seq. (particularly § 1114(1) and § 1121), and under 28 U.S.C. § 1338.

7. Daimler-Benz owns the famous trademarks and service marks MERCEDES-BENZ, and the design of a Three-Pointed Star in two dimensional forms. Daimler-Benz has long used these trademarks to identify automobiles of superior quality that are well known in the United States and throughout the world, and for parts, accessories and services therefor.

8. Daimler-Benz has registered its MERCEDES-BENZ and Three-Pointed Star trademarks and service marks in the United States Patent and Trademark Office. Such registrations include:

MARK	REG. NO.	DATE OF ISSUE
MERCEDES-BENZ and Three-Pointed Star in three dimensional form (trademark)	285, 557	July 28, 1931
MERCEDES-BENZ (trademark)	657, 386	January 21, 1958
MERCEDES-BENZ (service mark)	1,060,986	March 8, 1977
Three-Pointed Star in two dimensional form (trademark)	657,387	January 21, 1958
Three-Pointed Star in two dimensional form (service mark)	1,045,081	July 27, 1976
Three-Pointed Star in three dimensional form (trademark)	661,311	May 6, 1958
Three-Pointed Star in three dimensional form (service mark)	1,045,080	July 27, 1976

Copies of the official certificates reflecting such registrations are attached as Exhibits 1A-1G. Said registrations are valid, subsisting, uncancelled and unrevoked.

9. Daimler-Benz has continuously used the aforesaid trademarks and service marks throughout the State of Texas and the United States since long prior to the acts complained of

herein, and for many decades, to identify and distinguish its automobiles, their parts, accessories and related products, as well as the maintenance, repair and related services furnished by or through its authorized and licensed distributors and dealers.

10. Mercedes-Benz, and its predecessor in business, as exclusive distributors of Mercedes-Benz automobiles and parts in the United States and pursuant to license by Daimler-Benz, have continuously used said trademarks and service marks in commerce since long prior to the acts complained of herein, and since at least 1965, for the same purposes as Daimler-Benz. Since at least 1965, Mercedes-Benz, and its predecessor in business, have also used "Mercedes-Benz" as a trade name for said purposes.

11. Pursuant to license, hundreds of authorized Mercedes-Benz dealers have long and extensively used and advertised Plaintiffs' MERCEDES-BENZ and Three-Pointed Star trademarks and service marks throughout the United States to signify to the public that they are authorized Mercedes-Benz dealers. Hundreds of thousands of Mercedes-Benz automobiles, parts and accessories and extensive maintenance, repair and related services have been sold, furnished and advertised under said marks by such authorized dealers throughout the United States, including the State of Texas.

12. Plaintiffs have expended considerable sums of money using, promoting and advertising said marks and trade name in commerce and, as a result of such efforts, and of the world-wide reputation of Plaintiffs' automobiles for high quality and exceptional performance[.] Plaintiffs' marks and the trade name "Mercedes-Benz" have attained extraordinary fame and inestimable goodwill and now are among the most famous and distinctive marks and names throughout the United States and the world, including the State of Texas.

13. Since long prior to the acts complained of herein, Plaintiffs' MERCEDES-BENZ marks have frequently been used and advertised in the form "Benz" throughout the United States, including the State of Texas, to identify Plaintiffs' automobiles.

14. As a result of their long, continuous and extensive use, Plaintiffs' MERCEDES-BENZ and Three-Pointed Star marks, the trade name "Mercedes-Benz" and the designation "Benz" have long been and are now recognized by the trade and public as identifying Plaintiffs and the automobiles, parts, accessories and maintenance, repair and related services sold and furnished by Plaintiffs and their authorized dealers. Due to the excellence of said products and services, Plaintiffs have earned among the trade and public a valuable reputation and tremendous goodwill symbolized by said marks, trade name and designation.

15. Decades after the adoption and use in the State of Texas and in commerce of Plaintiffs' MERCEDES-BENZ and Three-Pointed Star trademarks and service marks, Defendant, with actual knowledge of Plaintiffs' said marks, began to engage in the business of purchasing and selling automobiles and related services, under Plaintiffs' Three-Pointed Star mark and the deceptively similar trade name "Haus of Benz," in direct competition with Mercedes-Benz and its licensed dealers.

16. Defendant is using and has used Plaintiffs' Three-Pointed Star mark and the deceptively similar trade name, "Haus of Benz," on signs as shown in attached Exhibits 2-5, on business cards as shown in attached Exhibit 6, on invoices as shown in attached Exhibit 7, on checks as shown in attached Exhibit 8, on promotional literature as shown in attached Exhibit 9, and on other items connected with his business. By said actions, Defendant is falsely representing to the public that Defendant is an authorized Mercedes-Benz representative or

that Defendant or his activities are otherwise or affiliated with, or sponsored or approved by, Plaintiffs.

17. Defendant has no association or affiliation whatsoever with either Plaintiff, and Defendant does not have the consent of either Plaintiff to use the Three-Pointed Star mark or the trade name "Haus of Benz." The services that Defendant provides are not the services of either Plaintiff and do not have the sponsorship or approval of either Plaintiff.

18. Defendants's use of Plaintiffs' Three-Pointed Star mark and the deceptively similar trade name "Haus of Benz" is likely to cause confusion, mistake or deception.

19. By his aforesaid actions, Defendant has infringed each of Daimler-Benz's said registered marks. Defendant has done so willfully and deliberately and with the intention of wrongfully trading on the tremendous goodwill and reputation of Plaintiffs symbolized by each of said registered marks.

20. Defendant's use of the Three-Pointed Star mark and the trade name "Haus of Benz" has been made in or affecting commerce. Upon learning of Defendant's said infringing use, Plaintiffs promptly wrote to Defendant requesting that he cease such use forthwith. Subsequently, Defendant expressly represented to Plaintiffs that such use would cease. Nevertheless, Defendant has not ceased his infringements.

21. Defendant's conduct as described above has damaged and will continue to damage Plaintiffs – to Plaintiffs' irreparable injury – unless restrained by this Court, and Plaintiff has no adequate remedy at law.

22. By reason of Defendant's bad faith and willful conduct in deliberate disregard of the rights of Plaintiffs, Plaintiffs are entitled to recover actual damages, treble damages,

an accounting for profits, attorneys' fees and the costs of this litigation pursuant to 15 U.S.C. § 1117.

COUNT TWO

COMMON LAW INFRINGEMENT OF TRADEMARKS AND SERVICE MARKS

23. Plaintiffs reallege and incorporate herein the allegations of paragraphs 1 through 22 inclusive.

24. This cause of action for infringement of trademarks and service marks arises under the common law of the State of Texas. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 and § 1338(b).

25. Defendant's use of Plaintiffs' Three-Pointed Star mark and the deceptively similar trade name "Haus of Benz" is likely to cause confusion, mistake or deception.

26. By his aforesaid actions, Defendant has infringed each of Daimler-Benz's trademarks and service marks referenced above. Defendant has done so willfully and deliberately and with the intention of wrongfully trading on the tremendous goodwill and reputation of Plaintiffs symbolized by each of said marks.

27. Defendant's conduct as described above has damaged and will continue to damage Plaintiffs – to Plaintiffs' irreparable injury – unless restrained by this Court, and Plaintiffs have no adequate remedy at law.

28. Plaintiffs are entitled to an award of damages from Defendant for the loss of business and other monetary losses that Plaintiffs have suffered and will continue to suffer in the future as a proximate result of Defendant's misappropriation and infringement of the Three-Pointed Star mark and the trade

name "Haus of Benz." Alternatively, Plaintiffs are entitled to recover damages in an amount equivalent to the amount of profits that Defendant has derived and may continue to derive as a result of his unlawful misappropriation and infringement of Plaintiffs' marks and trade name.

29. Defendant's conduct as described above has been willful, deliberate, malicious, and intended to injure Plaintiffs and Plaintiffs' business operations. Therefore, Plaintiffs are also entitled to recover exemplary damages from Defendant to punish Defendant and to deter Defendant and others similarly from engaging in similar wrongful conduct in the future.

COUNT THREE

FEDERAL UNFAIR COMPETITION

30. Plaintiffs reallege and incorporate herein the allegations of paragraphs 1 through 29 inclusive.

31. This action is for false designation of the origin of services and goods and false description or representation of services and goods, in or affecting commerce, arising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). This Court has jurisdiction under 15 U.S.C. § 1331 and § 1338(a).

32. Defendant's intentional and unlawful use in or affecting commerce of marks and a trade name that are identical or confusingly similar to Plaintiffs' federally registered marks shown in attached Exhibits 1A through 1G, the trade name "Mercedes-Benz" and the designation "Benz," constitutes false designation of the origin of Defendant's services and goods as well as a false description or representation that Defendant is connected or affiliated with, or sponsored or authorized by, Plaintiffs. Defendant's actions are calculated to cause confusion or mistake among his customers and potential customers as to the true origin, source, sponsorship or affiliation of Defendant

and his services and goods in violation of 15 U.S.C. § 1125(a), and Plaintiffs are entitled to recover actual and treble damages, an accounting for profits, attorneys' fees, and the costs of this litigation pursuant to 15 U.S.C. § 1117.

COUNT FOUR

COMMON LAW UNFAIR COMPETITION

33. Plaintiffs reallege and incorporate herein the allegations of paragraphs 1 through 32 inclusive.

34. This is an action for unfair competition at common law. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 and § 1338(b).

35. Defendant's aforesaid wrongful acts and unauthorized use of marks and a trade name that are identical with or confusingly similar to Plaintiffs' aforesaid marks, the trade name "Mercedes-Benz" and the designation "Benz," constitute unfair competition, unlawful interference with Plaintiffs' advantageous business relationships, and misappropriation of Plaintiffs' tremendous goodwill.

36. Defendant's conduct was and is intentional and in deliberate disregard of the rights of Plaintiffs. By reason thereof, Plaintiffs are entitled to recover not only actual damages, but also punitive or exemplary damages in an amount sufficient to deter Defendant from similar conduct in the future.

COUNT FIVE

FEDERAL ACT
DILUTION OF MARKS AND TRADE NAME
AND INJURY TO BUSINESS REPUTATION

37. Plaintiffs reallege and incorporate herein the allegations of paragraphs 1 through 36 inclusive.

38. This action, to enjoin the dilution of Plaintiffs' famous and distinctive marks and trade name, and to enjoin injury to Plaintiffs' business reputation, arises under 15 U.S.C. § 1125(c). This Court has jurisdiction under 15 U.S.C. § 1331 and § 1338(a).

39. Defendant's aforesaid conduct is likely to dilute and has diluted the distinctive quality of Plaintiffs' Three-Pointed Star marks and MERCEDES-BENZ marks and trade name, which are famous and distinctive, in violation of 15 U.S.C. § 1125(c).

40. Defendant's aforesaid conduct is likely to injure and has injured the business reputation of Plaintiffs in violation of 15 U.S.C. § 1125(c). Accordingly, Plaintiffs are entitled to injunctive relief so as to restrain Defendant from making any further use of Plaintiffs' Three-Pointed Star marks or the name "Haus of Benz."

41. Furthermore, Defendant, by his conduct, willfully intended to trade on Plaintiffs' reputation and to cause dilution of Plaintiffs' famous and distinctive marks and trade names. Because of Defendant's willful intent, Plaintiffs are entitled to the additional remedies set forth in 15 U.S.C. §§ 1117(a) and 1118, including actual and treble damages, an accounting for profits, attorneys' fees, and the costs of this litigation.

COUNT SIX

STATE ACT
DILUTION OF MARKS AND TRADE NAME
AND INJURY TO BUSINESS REPUTATION

42. Plaintiffs reallege and incorporate herein the allegations of paragraphs 1 through 41 inclusive.

43. This action, to enjoin the dilution of Plaintiffs' distinctive marks and trade name, and to enjoin injury to Plaintiffs' business reputation, arises under Section 16.29 of the Texas Business and Commerce Code. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 and § 1338(b).

44. Defendant's aforesaid conduct is likely to dilute and has diluted the distinctive quality of Plaintiffs' Three-Pointed Star marks and MERCEDES-BENZ marks and trade name in violation of Section 16.29 of the Texas Business and Commerce Code.

45. Defendant's aforesaid conduct is also likely to injure and has injured the business reputation of Plaintiffs in violation of Section 16.29 of the Texas Business and Commerce Code. Accordingly, Plaintiffs are entitled to injunctive relief so as to restrain Defendant from making any further use of Plaintiffs' Three-Pointed Star marks or the name "Haus of Benz."

COUNT SEVEN

DECLARATORY JUDGMENT

46. Plaintiffs reallege and incorporate herein the allegations of paragraphs 1 through 45 inclusive.

47. Plaintiffs request this Court, pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, to declare the rights of the parties with respect to Defendant's actions, as described above.

48. Plaintiffs have been required to retain the law firm of Jackson Walker L.L.P. to prosecute this action and, therefore,

request an award of reasonable and necessary attorneys' fees pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code.

WHEREFORE, Plaintiffs pray for a judgment as follows:

A. That Defendant, his agents, servants, employees, attorneys and successors, and all those in active, concert and participation with him, be enjoined and restrained during the pendency of this action and permanently thereafter from directly or indirectly:

1. using or advertising Plaintiffs' Three-Pointed Star mark, the trade name "Haus of Benz or any other name or mark identical or confusingly similar to Plaintiffs' Three-Pointed Star or MERCEDES-BENZ marks, the trade name "Mercedes-Benz" or the designation "Benz";

2. infringing the federally registered Three-Pointed Star and MERCEDES-BENZ marks, the trade name "Mercedes-Benz" and the designation "Benz" in the manner herein complained of or by any other conduct;

3. designating falsely the origin of Defendant's services and goods or falsely describing or representing such services and goods by using Plaintiffs' Three-Pointed Star mark or the name "Haus of Benz" in the manner herein complained of or by any other conduct;

4. engaging in unfair competition with Plaintiffs in the manner herein complained of or by any other conduct;

5. injuring the business reputations of Plaintiffs or diluting or misappropriating their marks and trade name and the goodwill symbolized thereby.

B. That Defendant deliver up for destruction all signs, awnings, business cards, invoices, stationery, rubber stamps, plates, checks, and other printed materials bearing any of Plaintiffs' aforesaid marks or names, or the name "Haus of Benz," or any other mark or name confusingly similar to any of Plaintiffs' said marks or names.

C. That Defendant file with this Court and serve on Plaintiffs within 30 days after service of the injunction on Defendant a report in writing, under oath, setting forth in detail the manner and form in which Defendant has compiled with said injunction.

D. That Plaintiffs be awarded compensatory damages for the injuries sustained by Plaintiffs as a result of the acts herein complained of and that said damages be trebled pursuant to 15 U.S.C. § 1117.

E. That Defendant be required to account for and pay over to Plaintiffs all gains, profits, savings and advantages derived by Defendant from the acts herein complained of.

F. That Plaintiffs be awarded punitive and exemplary damages in an amount sufficient to deter in the future Defendant's willful acts herein complained of.

G. That this Court, pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, declare the rights of the parties with respect to Defendant's actions.

G [sic]. That Plaintiffs have and recover their costs in this suit including reasonable attorneys' fees and expenses.

H. That Plaintiffs have such other and further relief as this Court may deem just and proper.

Respectfully submitted,

JACKSON WALKER L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202
(214) 953-6000
Telecopier: (214) 953-5822

By: /s/
Frank C. Vecella
Texas Bar No. 20532500
Brian A. Kilpatrick
Texas Bar No. 00784392

APPENDIX M

MERCEDES-BENZ AG
of Stuttgart-Unterturkheim (Germany)

hereinafter referred to as "Mercedes-Benz"

and

MERCEDES-BENZ OF NORTH AMERICA, INC.,

a Delaware corporation with its principal offices at
One Mercedes Drive, Montvale, New Jersey 07645

---

hereinafter referred to as the General Distributor -

enter into the following

GENERAL DISTRIBUTION AGREEMENT

Art. 1

CONTRACT GOODS

The contract goods shall be the following new motor vehicles manufactured by Mercedes-Benz, and fitted with Mercedes-Benz trade marks, in the versions intended for the United States of America as well as chassis and parts therefor:

PASSENGER CARS

Successor and supplementary models within existing model series shall become contract goods upon their launching in the contract territory.

Art. 2

RIGHTS OF DISTRIBUTION

(1) Mercedes-Benz confers upon the General Distributor under the terms of this Agreement the exclusive distribution rights for the contract goods within the contract territory (Art. 3 hereof).

(2) Excluded from this right of distribution shall be all transactions made

a) with resellers, who do not belong to the General Distributors sales network, for the purpose of resale or passing-on, irrespective of whether such resale or passing-on is effected directly or indirectly, with the exception of transactions concerning

- the supply of chassis or vehicles to body manufacturers of any type for the purpose of mounting bodies, or

- the supply of spare parts to resellers whose place of business is within the contract territory, if the parts are neither directly nor indirectly intended for export;

b) with buyers whose place of residence or business domicile is outside the contract territory.

(3) Subject to Clause 5 of this Article, Mercedes-Benz shall not be entitled to sell contract goods within the contract territory to resellers other than the General Distributor or to ultimate buyers.

(4) Intentionally omitted.

(5) In individual cases, Mercedes-Benz may sell contract goods to ultimate buyers residing within the contract

territory if such persons effect the purchase during a visit to Mercedes-Benz, at an exhibition or on the occasion of a sporting event, if they refuse to purchase from the General Distributor, or if there is a risk of the deal otherwise being lost. As a compensation, the General Distributor will receive payment, in case of cars, of 3%, and in the case of trucks of up to 3% of the German list price (excluding V.A.T.) of the vehicle in its basic version. Payment of such compensation is subject to full settlement of the transaction including full payment. General Distributor reserves its rights to sale of contract goods pursuant to its European Delivery Program.

Art. 3

CONTRACT TERRITORY

The contract territory shall be the United States of America and the following possessions: Guam, Puerto Rico and U.S. Virgin Islands.

Art. 4

SETTLEMENT OF TRANSACTIONS

(1) The General Distributor shall buy and sell in his own name and on his own account.

(2) All orders of the General Distributor shall be governed by Mercedes-Benz' terms of sale applicable at the time when the order is accepted. Copies of the current "Sales Conditions for Vehicles (A/E)" and of the "Conditions for the Supply of Loose Spare Parts and Accessories as well as Assemblies, Exchange Parts and Exchange Assemblies (E/ET/E)" are attached hereto as Exhibits 1 and 2.

(3) See Exhibit 3.

(4) See Exhibit 3.

(5) The General Distributor will immediately inform Mercedes-Benz of its prices applicable to ultimate buyers and dealers together with the price calculations as well as any modifications that may occur.

(6) Upon Mercedes-Benz' request, the General Distributor shall determine its sales prices on consultation with Mercedes-Benz.

Art. 5

SALES TARGETS, STOCKS, DEMONSTRATION VEHICLES

(1) The General Distributor shall endeavor to reach maximum imports and sales of contract goods. Mercedes-Benz shall, together with the General Distributor, determine purchase figures and planning schedules. If the parties do not reach agreement (purchase figures and planning schedule), the figures determined by Mercedes-Benz on the basis of estimated sales shall apply. Advance estimates shall cover periods of 12 months.

(2) The General Distributor agrees to maintain permanently for his own account a stock of contract goods corresponding in quantity and assortment to the extent of the General Distributor's business, and organized according to Mercedes-Benz principles. In the absence of an agreement between the parties and minimum stock quantity, Mercedes-Benz may determine such minimum stock quantities for contract goods. Advance estimates shall be for periods of 12 months.

(3) The General Distributor shall keep in stock a number of demonstration vehicles corresponding to the extent of his business. In the absence of agreement between the parties hereto, Mercedes-Benz shall determine the number and assortment of demonstration vehicles on the basis of estimated potential sales by the General Distributor.

Art. 6

SALES ORGANIZATION

(1) The General Distributor agrees to maintain a dealer network which in terms of quality and capacity will ensure intensive covering of the contract territory regarding sales, as well as expert service and supply of parts.

(2) The General Distributor agrees to maintain showrooms which in terms of size and location are commensurate with the prestige of Mercedes-Benz.

(3) As regards the sale of contract goods, the used vehicle business, service and the supply of parts, as well as business management and organization (including EDP systems), the General Distributor shall organize the sales network to conform with Mercedes-Benz standards.

The standards applicable from time to time will, inter alia, relate to the following:

- size, equipment and furnishing of premises belonging to sales network as regards formal and technical aspects and personnel.

- work organization (including forms), handling, reporting and planning systems.

- the use of data processing systems recommended by Mercedes-Benz including the relevant technical EDP connections.

(4) The General Distributor will keep his own personnel and his dealers advised of all information received from Mercedes-Benz. Furthermore, he will be responsible for regular advice and training as regards sales, service, parts system and business management and organization to conform with Mercedes-Benz standards.

(5) See Exhibit 4.

(6) Mercedes-Benz shall without delay be advised of the dealers' addresses and any changes that may occur.

(7) The General Distributor shall be responsible for compliance by the dealers with their obligations pursuant to General Distributor's Dealer Agreement.

(8) See Exhibit 4.

Art. 7

SERVICE

(1) The General Distributor agrees to provide service (servicing, maintenance and repair work) for the Mercedes-Benz range mentioned in this Agreement within the contract territory which conforms to Mercedes-Benz standards. The service shall be carried out in accordance with Mercedes-Benz requirements. The General Distributor shall guarantee careful service also for customer vehicles from areas outside the contract territory and for foreign versions of vehicles.

(2) All workshops used to service customer vehicles must meet the Mercedes-Benz standards as regards size, personnel, equipment and organization. The necessary equipment and special tools shall be obtained and adjusted to meet the current level of product technology. Knowledge of members of the staff concerning service shall be kept up to date by sending them on training courses.

(3) The obligations accepted by the General Distributor under this Agreement shall be imposed, mutatis mutandis, to authorized workshops, service stations and other workshops that are party to the General Distributor's Dealer Agreement.

Art. 8

WARRANTY

(1) As part of his servicing obligations for the Mercedes-Benz range of products described in this Agreement, the General Distributor agrees to carry out warranty work on vehicles, chassis, major assemblies and parts supplied by Mercedes-Benz in accordance with Mercedes-Benz directives, irrespective of where or by whom these were sold or delivered, including foreign versions. Warranty obligations for contract goods sold outside the contract territory shall follow either the warranty terms that apply within the contract territory or the relevant foreign warranty terms, depending on which terms provide the lesser extent of warranty coverage. Mercedes-Benz reserves the right to extend the obligation to perform warranty work to other products supplied by it.

(2) The General Distributor shall bear the warranty within his contract territory and shall ensure that customers' warranty claims are settled without delay. Depending on

the technical requirements, warranty work shall consist either of replacement or repair, without any charge to the customer for labor, parts, freight and customs duty. The General Distributor shall immediately submit the warranty claim to Mercedes-Benz and shall keep the parts that have been replaced in a warranty compound. Mercedes-Benz shall be entitled to examine the claim and the removed parts to establish whether the claim is justified.

(3) For approved warranty work the General Distributor shall receive reimbursement which shall be determined by Mercedes-Benz.

(4) The General Distributor shall use only original Mercedes-Benz parts for warranty work.

(5) Processing of warranty claims that follow the Mercedes-Benz instructions set out in the "Manual for Warranty Procedure."

(6) Clauses 1 and 3 - 5 shall apply mutatis mutandis to goodwill - repairs paid by Mercedes-Benz in whole or in part, as well as to work done in connection with service measures or similar campaigns.

(7) If the General Distributor gains knowledge of any defects which could impair the safety of a vehicle, he shall immediately inform the departments listed in the "Manual for Warranty Procedure", irrespective of whether the defect occurred during or after expiration of the warranty period.

Art. 9

SALE AND USE OF PARTS

(1) The General Distributor may neither sell or nor use for the repair or maintenance of Mercedes-Benz vehicles or chassis any parts, assemblies, exchange assemblies or exchange parts which compete with Mercedes-Benz original parts if these are not of the same quality standard as Mercedes-Benz original parts. For purposes of this Agreement, Mercedes-Benz original parts shall mean parts, assemblies, exchange assemblies and exchange parts which are supplied by Mercedes-Benz.

(2) If the General Distributor uses parts other than original Mercedes-Benz parts, he must inform customers that he also uses other parts by means of a clearly visible notice in the repair reception and in the rooms used for selling parts. He shall also notify each customer in writing if he has used such parts although original; Mercedes-Benz parts were available. To the extent necessary for compliance with this provision and with Clause 4 of Art. 8 hereof, the General Distributor shall store Mercedes-Benz original parts separately from other parts (the latter without using a Mercedes-Benz part number).

Art. 10

CANVASSING, ADVERTISING, SALES PROMOTION IDENTIFICATION

(1) The General Distributor shall carry out such advertising and canvassing activities for new and used vehicles, parts, customer service and other services as well as for the branch of Mercedes-Benz as are appropriate to the size and potential of the market of the General Distributor's territory. In doing so, the General Distributor shall

observe Mercedes-Benz directives. Mercedes-Benz reserves the right to demand discontinuation or alteration of such activities.

(2) It is in the common interests of both Mercedes-Benz and the General Distributor to establish a corporate identity of the dealer network worldwide. Therefore, the General Distributor agrees to observe the Mercedes-Benz directives for identification in designing his premises (inside and outside appearance), his outdoor advertising and stationery.

(3) The General Distributor shall report regularly to Mercedes-Benz on all advertising and sales promotional measures adopted by him and his dealers and on the effects of such measures, including in the report a statement of the expenditure and copies, etc. The General Distributor shall also inform Mercedes-Benz of measures and initiatives undertaken which are free of charge (e.g., editorial reports). The General Distributor agrees that any advertising and promotional material referred to Mercedes-Benz may be passed on to other General Distributors by way of an exchange of information.

Art. 11

SERVICE COMMISSION

(1) The General Distributor shall receive a service commission

a) if another General Distributor or one of his authorized dealers supplies a vehicle to a customer who[se] p[l]ace of residence or business is within the General Distributor's contract territory.

b) if customers from outside the contract territory themselves or through a third party sell or otherwise pass on a vehicle into the contract territory within six months after delivery.

c) if manufacturers of vehicle bodies resell into the contract territory chassis or vehicles supplied to them, together with the vehicle bodies mounted by them,

provided that the General Distributor furnishes proof of the vehicle having been serviced properly in a workshop and that application for the payment of a service commission is made within a period of 12 months after delivery of the vehicle to the customer. In the case mentioned under c) above, the period for application begins on the date of delivery of the completed vehicle by the body manufacturers. The service commission amounts to 3% of the German list price (exclusive of VAT) of the basic version of the vehicle at the time of delivery ex works. Mercedes-Benz can release itself from this claim by transferring to the General Distributor its claim against the General Distributor who sold the vehicle.

(2) On the other hand, the General Distributor shall pay the same amount to Mercedes-Benz for each vehicle sold by him that leaves the contract territory in one of the ways described in Clause 1 [paragraphs a) to c)] of this Art. 11. Mercedes-Benz may charge the full difference between net export price and German list price if the General Distributor could have realized when concluding the deal that the customer's place of residence or business was outside the contract territory or that the customer would pass the vehicle on into another territory within 6 months. Charge of the full difference between export net price and German list price shall not be made if the vehicles are

passed on by central purchasing agencies, their business or branches, or body manufacturers, or if the conditions for a tourist transaction are met.

(3) Furthermore, Mercedes-Benz may debit the full balance between net export price and German list price if the General Distributor sells a vehicle to a reseller not belonging to the Mercedes-Benz dealer network, except if the General Distributor was not in a position to realize that the vehicle was to be resold.

(4) Clauses (1) and (2) above shall not apply if the General Distributor concerned (Mercedes-Benz in the case of a sale to the Federal Republic of Germany) agreed to the deal in advance.

Art. 12

GENERAL OBLIGATIONS

(1) The General Distributor shall develop the contract territory systematically, he shall spare no efforts to sell the contract goods and to represent directly and indirectly the interest of Mercedes-Benz. He shall inform Mercedes-Benz in good time of any transactions he feels unable to conclude, in order for Mercedes-Benz to assist with the deal. The General Distributor shall report to Mercedes-Benz at least once a month on the development of sales and stocks.

(2) The General Distributor shall submit to Mercedes-Benz his annual statement of accounts (balance sheets, profit and loss account) within one month after completion, and he shall, in good time, give such details as appear necessary to Mercedes-Benz in order to advise on business management (inter alia: operating and financial

statements). Mercedes-Benz shall treat such records and data confidentially.

(3) Mercedes-Benz shall have the right at any time to send an authorized representative to the contract territory. The General Distributor shall assist the representative in every way to carry out the task assigned to him, in particular by supplying information and by permitting inspection of his records.

(4) During the term of this Agreement, the General Distributor shall not, without prior written consent of Mercedes-Benz,

a) modify Mercedes-Benz motor vehicles or chassis unless such modification has been ordered by an ultimate buyer and concerns a particular motor vehicle or chassis purchased by that ultimate buyer; provided, however, that such modification shall not under any circumstances impair the roadworthiness and operating safety of the vehicle;

b) manufacture motor vehicles or chassis;

c) offer for sale, arrange the sale of, or sell factory-new motor vehicles or chassis of other manufacturers;

d) conclude with third parties agreements on the distribution and/or servicing of motor vehicles or chassis of other manufacturers; this also includes Mercedes-Benz motor vehicles which have been modified technically or visually as well as parts kits offered by third parties for this purpose.

(5) During the term of this Agreement, the General Distributor shall, without prior written consent by

Mercedes-Benz, neither directly nor indirectly take up a stock interest which (as to capital stock or voting rights) is higher than 25% in a company to which any of the cases mentioned in Clause 4 of this Art. 12 apply. The General Distributor shall ensure that the obligations set out in Clause 4 of this Art. 12 are met by his partners (shareholders) and managing directors, as well as by companies that have shares in his business.

(6) The obligation set out under paragraph c) of Clause 4 shall not apply with respect to goods which are already being offered, arranged for, or sold by the General Distributor at the time the Agreement is concluded. These are: Not Applicable.

(7) Internal matters concerning the contractual relationship shall be treated confidentially.

Art. 13

DESIGNATION OF THE GENERAL DISTRIBUTOR and USE OF TRADEMARKS

(1) The General Distributor shall have the right and the duty during the term of, and for activities in connection with this Agreement to style himself in all documents, notices and advertisements as

MERCEDES-BENZ OF NORTH AMERICA, INC.

The design of the documents and papers bearing his designation shall be agreed with Mercedes-Benz.

(2) The General Distributor shall have the right and the duty to use for his activities under this Agreement the names, trademarks and service marks of Mercedes-Benz, however, exclusively for the designation of Mercedes-

Benz products and services for these products and in a manner approved by Mercedes-Benz. Names or trademarks of Mercedes-Benz shall not form part of the General Distributor's own company name without express written consent by Mercedes-Benz.

Art. 14

DURATION OF AGREEMENT

(1) This Agreement shall become effective on January 1, 1995 and is concluded for an indefinite period. Both parties shall have the right to give written notice of termination one year in advance, to become effective at the end of a quarter. If, after notice has been given, the business relationship shall tacitly be maintained beyond the duration of the Agreement, the provisions of this Agreement shall continue to govern such relationship; both parties shall, however, in this event have the right to declare with immediate effect the termination of the business relationship.

(2) Both parties hereto have the right to terminate the contractual relationship for good cause shown. Such good cause is, for Mercedes-Benz, in particular:

a) Grave violation of the provisions of this Agreement in spite of written warning. No warning is necessary if the violation of essential obligations under this Agreement is so grave that Mercedes-Benz cannot reasonably be expected to continue the contractual relationship until regular termination becomes effective.

b) Insolvency and repeated protests of checks or bills.

c) Constantly recurring disagreements amongst the proprietors, partners and managing directors, if this seriously endangers the fulfillment of this Agreement.

d) Force Majeure such as natural catastrophes, war, revolution, strike.

e) Any changes concerning the proprietor or managing director or the shareholders/partners of the distribution of the capital of the General Distributor, as well as the disposal of substantial shares of the business assets require the prior written consent of Mercedes-Benz. Mercedes-Benz shall not withhold its approval if no impairment of its interest is to be expected.

(3) Intentionally omitted.

Art. 15

CONSEQUENCES OF TERMINATION OF THIS AGREEMENT

(1) On termination of this Agreement – for whichever reason – Mercedes-Benz shall have the right to purchase all or any of the stock of its products at a price not higher than the net invoice value thereof plus any proved freight, insurance and customs charges. Any printed matter, drawings, etc. which remain the property of Mercedes-Benz shall be returned to Mercedes-Benz by the General Distributor on termination of this Agreement.

(2) Intentionally omitted.

(3) After termination of this Agreement, the General Distributor shall discontinue the use in any way of names,

trademarks and service marks of Mercedes-Benz. He shall, in particular, remove the names, trademarks and service marks of Mercedes-Benz from his company name - if their use for this purpose had as an exception been permitted - and extinguish all references to the previous contractual relationship, e.g., on stationery, advertising material and directories. No right of retention shall be exercised against such claims made by Mercedes-Benz.

Art. 16

GENERAL PROVISIONS

(1) Any changes in or additions to this Agreement shall be made in writing.

(2) Claims of the General Distributor arising from this Agreement or from individual orders are not transferrable.

(3) If one provision of this Agreement is void or ineffective, this shall not affect the validity of the remaining provisions. In such case, the contracting parties are under an obligation to reach an agreement immediately on a provision which will be as similar as possible to the void or invalid provision from the economical point of view.

(4) This Agreement shall be subject to the law of the Federal Republic of Germany.

(5) The place of jurisdiction for all claims arising from this Agreement and for all other contractual and non-contractual claims of the contracting parties in connection with the distributor relationship shall be Stuttgart, or, at Mercedes-Benz' discretion, the place of residence or business of the General Distributor.

Remarks

1. The parties hereto have agreed upon other terms and conditions set out in Exhibits 3 - 4 attached hereto and made a part hereof.

2. The relation between the parties hereto is that of vendor-vendee; the General Distributor is not the agent of Mercedes-Benz and shall have no express or implied right to bind Mercedes-Benz in any manner or thing whatsoever, without the prior written consent of Mercedes-Benz.

3. The prior "Distribution Agreement" between Daimler-Benz AG/Mercedes-Benz AG and Daimler-Benz North America, Inc./Mercedes-Benz North America, Inc. dated as of April 1, 1974 and all modifications thereto be and is hereby terminated and replaced by this General Distribution Agreement.

4. The Agreement on the use of trademarks, trade names and service marks between Daimler-Benz AG/Mercedes-Benz AG and Daimler-Benz North America, Inc./Mercedes-Benz of North America, Inc. dated February 25, 1991, is an integrated part of this General Distributor Agreement. General Distributor shall not be obligated to pay any separate consideration for the rights conferred upon it by said Agreement.

Stuttgart-Unterturkheim, this day of April, 1995.

MERCEDES-BENZ AG

/s/ /s/
Egle Gorgels

GENERAL DISTRIBUTOR

MERCEDES-BENZ OF
NORTH AMERICA, INC.

By: /s/
Michael Bassermann, President

Attest: : /s/
Anthony P. La Spada
Ass't. Secretary